

CONFRONTING THE CROWN

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Table of contents

Table of contents	i
Abstract	vii
Acknowledgements	viii
Chapter 1: Introduction	1
1.1. Overview	1
1.2. Relevance	3
1.3. Structure	4
Chapter 2: Methodology	6
2.1. Measures of effectiveness	6
2.2. Rule of law	7
2.2.1. Dicey's three meanings	8
2.2.2. Restating the rule of law	11
2.3. Treatment of primary and secondary sources	13
2.4. Use of historical analysis	13
2.4.1. Relevance of history	14
2.4.2. Applied legal history	15
2.4.3. Internal and external legal history	18
2.5. Use of cross-jurisdictional law and commentary	20
Chapter 3: Definitions	23
3.1. Overview	23
3.2. The State	23
3.3. Is the Crown a State theory?	24
3.4. Government	25
3.5. Terminological choices	26
Chapter 4: The Sovereign and the government	28
4.1. Overview	28
4.2. Origins of the Crown	28
4.2.1. Metaphor for kingship	29
4.2.2. The Crown transcends the king	30
4.2.3. Early glimpses of a corporation aggregate	31
4.3. The fusion of Crown and king	33
4.3.1. The king's two bodies	33

4.3.2. The inseparability of the bodies politic and natural	36
4.3.3. Crown becomes the king as corporation sole	39
4.3.4. Incoherence overlooked	40
4.4. The Crown conceals a change	41
4.4.1. When analogy reflected reality	42
4.4.2. The emergence of responsible government	43
4.4.3. The changing and constant Crown	45
4.5. Crown and the colony of New Zealand	48
4.5.1. Different perspectives	48
4.5.2. Persistent ambivalence	51
4.5.2.1. Interchangeability of Crown and Sovereign	51
4.5.2.2. "What is the thing called...the government?"	53
4.6. The unfulfilled promise of the corporation aggregate analogy	55
4.7. Conclusion	61
Chapter 5: The three branches of government	63
5.1. Overview	63
5.2. Inconsistent usage	63
5.3. Public law damages against the Crown	66
5.3.1. <i>Maharaj v Attorney-General for Trinidad and Tobago (No 2)</i>	66
5.3.2. <i>Simpson v Attorney-General (Baigent's Case)</i>	68
5.3.3. <i>Attorney-General v Chapman</i>	70
5.4. Crown's duties under the Treaty of Waitangi	75
5.5. Conclusion	77
Chapter 6: The executive and the public sector	78
6.1. Overview	78
6.2. Statutory definitions of the Crown	79
6.3. Judicial enquiries into the Crown's ambit	81
6.3.1. "Control" test	82
6.3.2. "Prejudice" test	86
6.3.3. "Function" test	88
6.3.4. Servants, agents and other emanations	91
6.4. The historic evolution of the Crown's boundaries	94
6.4.1. Public functions and the Crown	94
6.4.2. Emergence of the control test	97
6.5. How necessary is the demarcation between the Crown and the public sector?	98

6.6. Conclusion	104
Chapter 7: The Crown in tort	105
7.1. Overview	105
7.2. The king can do no wrong	106
7.2.1. Petition of right	107
7.2.2. Immunity from tortious liability	111
7.2.2.1. <i>Viscount Canterbury v Attorney-General</i>	111
7.2.2.2. <i>Tobin v R</i>	113
7.2.2.3. <i>Feather v R</i>	115
7.3. Untenable policy justifications	117
7.3.1. The need for parliamentary appropriation	117
7.3.2. The non-immunity of servants	119
7.3.3. Vexatious litigation	121
7.3.4. Divergent law and practice	122
7.4. The contrasting position in colonies	125
7.4.1. Legislative reforms	126
7.4.2. Judicial recognition of direct liability	129
7.4.2.1. <i>Williams v R</i>	130
7.4.2.2. <i>Dawson v R</i>	133
7.4.2.3. Promising trends	134
7.5. The Crown Proceeding Act 1950	135
7.5.1. Background to the Act	135
7.5.2. No direct liability in tort	139
7.5.2.1. Uncertain prospect of institutional liability	141
7.5.2.2. Impact of officers' immunities on Crown vicarious liability	145
7.6. A missed opportunity for reform	151
7.7. Conclusion	153
Chapter 8: Immunity from mandatory orders	154
8.1. Overview	154
8.2. Untenable rationale	155
8.2.1. Uncritical retention of immunity	155
8.2.2. Contested modern justifications	159
8.3 Mandatory orders against officers of the Crown	167
8.3.1. Conflicting historical authorities	169
8.3.2. Three ministerial capacities	172

8.3.2.1. Relevance to judicial review proceedings	173
8.3.2.2. Ministers are immune in their official capacity	174
8.3.2.3. No immunity when acting <i>persona designata</i>	180
8.3.2.4. Orders available against ministers personally.....	185
8.3.3. <i>M v Home Office</i> : a “solution”?	191
8.3.3.1. Facts of <i>M</i>	191
8.3.3.2. At the High Court and Court of Appeal	192
8.3.3.3. At the House of Lords.....	193
8.3.3.4. Implications of <i>M</i>	195
8.3.3.4 (a) Whose immunity?	196
8.3.3.4 (b) Enduring confusion as to corporation analogy	200
8.4. Conclusion.....	203
Chapter 9: Presumption of exemption from statutes	204
9.1. Overview	204
9.2. No historical justification	205
9.3. Modern issues.....	207
9.3.1. Unequal treatment before the law	208
9.3.2. Interpretive uncertainty.....	212
9.3.3. Reversing the presumption: recommendations for reform.....	219
9.4. Conclusion.....	225
Chapter 10: Executive empowerment and the Crown	227
10.1. Overview	227
10.2. The Crown’s diminishing relevance to executive empowerment.....	228
10.3. The royal prerogative	231
10.3.1. Disputed definition.....	233
10.3.2. Uncertain scope	235
10.3.3. Undemocratic nature	240
10.3.4. Replacing prerogative powers.....	244
10.4. Residual freedom	251
10.4.1. Untenable theoretical basis	253
10.4.2. Limiting effect on individual freedom	256
10.4.3. A supplement to statutory powers?	259
10.4.4. Challenges as to existence	262
10.4.5. Reforms	264
10.4.5.1. Harris’s conventional expectation model.....	264

10.4.5.2. Cohn's limited model for residual freedom	267
10.4.5.3. Joseph's positive empowerment theory	270
10.4. Conclusion	276
Chapter 11: An alternative State theory	278
11.1. Overview	278
11.2. An existing State tradition	279
11.2.1. A part of New Zealand culture	279
11.2.2. Existing legal usage	281
11.2.3. Symbolic significance	283
11.3. A distinct legal personality from the Sovereign	286
11.4. The ambit of the State	289
11.4.1. An embodiment of all three branches of government	290
11.4.2. A State that embraces the whole public sector	291
11.4.3. Clarifying the ambit of the executive branch	294
11.4.4. Ambit of State liability	295
11.4.5. The State in statutes	297
11.5. The State in legal proceedings	302
11.5.1. Direct State liability	303
11.5.1.1. Conceptual justification	303
11.5.1.2. Implications for contract, public law and tort	305
11.5.2. No immunity from mandatory orders	308
11.5.3. No presumption of exemption from statute	309
11.5.4. Parties in a proceeding	310
11.6. Re-sourcing State power	311
11.6.1. Statutory replacement of the prerogative	312
11.6.2. "Reasonably incidental" exercise of statutory power	317
11.6.3. An integrated approach to re-sourcing executive power	318
11.7. The Treaty of Waitangi and the State	319
11.8. Achieving the shift: the "when" and "how"	320
11.8.1. No need to wait for republicanism	320
11.8.2. Proposed legislative reform	323
11.8.2.1. New legislation	323
11.8.2.2. Parliament's competence to enact reforms	326
11.9. Conclusion	329
Chapter 12: Conclusion	330

12.1. Achieving definitional clarity.....	330
12.2. A simpler and more coherent framework of liability.....	333
12.3. A coherent basis for executive power	336
12.4. Implementing the reforms.....	337
Bibliography	339

Abstract

The concept of the Crown suffers from several deficiencies. It is uncertain who or what the Crown is. The Crown refers to both the Sovereign and the executive government. It can denote the executive branch alone or all three branches of government. The legal approaches to determining whether a public entity is the Crown produce confusing and conflicting answers.

Vestiges of the Sovereign's personal immunities create gaps in the framework for executive liability. The Crown enjoys a residual immunity from direct tortious liability and is exempt from mandatory orders. Statutes do not bind the Crown except by express words or necessary implication. These rules often complicate judicial analysis of executive liability.

The concept of the Crown enables the executive to claim two non-statutory sources of authority, namely the royal prerogative and residual freedom. These sources of authority are conceptually difficult to reconcile with the constitutional ideal of democratic authorisation. They also create uncertainty about the scope of executive power.

This thesis proposes replacing the Crown with an alternative State theory that is more rational, coherent and simple. It submits that New Zealand law should recognise "the State" as a legal entity that embodies all three branches of government and the public sphere. The Sovereign can remain Head of State but the State should have a distinct legal personality from the Sovereign. The proposed State theory strips the executive of any immunity that is not functionally necessary. It further proposes that statute should displace the prerogative and residual freedom and become the only source of executive authority.

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Chapter 1: Introduction

1.1. Overview

At the core of the New Zealand constitution lies the ambiguous concept of the Crown. Maitland once described the Crown as a “convenient metaphor to cover our ignorance which prevents us from asking difficult questions.”¹ These words ring as true in 21st century New Zealand as they did in Maitland’s time.

The Crown is the closest approximation to a State theory in New Zealand; however, it suffers from significant deficiencies. The Crown attempts to construct a legal personality for the executive branch of government out of an abstract representation of the Sovereign. This gives rise to metaphysical debates about the Crown’s nature, in particular whether it is a corporation sole comprising the Sovereign alone or a corporation aggregate embracing the ministers and various government departments and agencies.²

Uncertainty shrouds the ambit of the Crown. Its boundaries do not coincide either with the policy-making “core” of the executive or the wider public sector.³ It is also unclear whether the Crown embodies all three branches of the government or only the executive. This impedes coherent explanations to questions such as who is liable for damages when the judiciary or legislature breaches a person’s rights, and whether the Treaty of Waitangi imposes duties on the executive alone or all three branches of government.⁴

The legal framework for proceeding against the Crown is sadly inadequate. English common law carried over the Sovereign’s personal immunities to the Crown qua executive. The Crown Proceedings Act 1950 aimed to remedy this issue by making the Crown liable as “if it were a

¹ FW Maitland *The Constitutional History of England* (Cambridge University Press, London, 1919) at 418.

² See Chapter 4.

³ See Chapter 6.

⁴ See Chapter 5.

private person of full age and capacity”.⁵ However, it has failed to do so. The Crown retains a residual immunity from direct liability in tort⁶ and no mandatory orders can lie against the Crown.⁷ Further, there is a presumption that the Crown is exempt from statute.⁸ These immunities are deviations from the constitutional principle of the rule of law with little legislative or judicial assessment of their functional justification.⁹

A further shortcoming of the Crown is that it provides a unsatisfactory account of the sources of executive power.¹⁰ The bulk of executive power is statutory and does not rely on the concept of the Crown for justification. The Crown’s prerogative powers are of uncertain scope and coexist uncomfortably with the constitutional ideal that executive power should be democratically legitimated. The Crown’s residual freedom allows the executive to compromise individual freedoms without positive legal authorisation and potentially to supplement the scope of statutory authorisation. There are powerful arguments for the reconceptualisation of both the prerogative and residual freedom.¹¹

This thesis submits that New Zealand needs a more effective State theory than the Crown. While some of the Crown’s shortcomings can be resolved by abolishing its outdated immunities, this would not be enough. The layers of confusion permeate the concept of the Crown too deeply to extricate from the term “Crown” itself.

⁵ Crown Proceedings Act 1950, s 6.

⁶ Ibid.

⁷ Ibid. at s 17.

⁸ Interpretation Act 1999, s 27.

⁹ See Chapters 7, 8 and 9.

¹⁰ See Chapter 10.

¹¹ B V Harris “Replacement of the royal prerogative in New Zealand” (2009) 23 NZULR 285; Margit Cohn “Medieval chains, invisible inks: on non-statutory powers of the executive” (2005) 25(1) OJLS 97; Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 655-659.

The thesis proposes replacing the Crown with an alternative State theory that is founded on the following principles:¹² there should be an entity called the State which has a distinct legal personality from the Head of State – the Queen. The Crown’s obligations under the Treaty of Waitangi should vest in the State. The State should embrace all three branches of government and the public sector. The State should be directly liable in tort and other areas of the law but Parliament should circumscribe the scope of State liability so that the central government is not liable for the actions of the entire public sector. Mandatory orders should be available against the State and all statutes should apply to the State in the absence of express words to the contrary within the statute. Finally, the executive’s powers should derive from statute and not derive from the powers and freedoms that attach to the Head of State.

The thesis contends that replacing the Crown with a State theory founded on these principles would be more consistent with the rule of law and instil greater rationality, coherence and simplicity in New Zealand’s constitutional arrangements.

1.2. Relevance

Three considerations have prompted this thesis. The first is the difficulty of explaining what the Crown is and where it fits within New Zealand’s constitutional arrangements. Every first year law student is familiar with the image depicting the three branches of government with the Sovereign on top as the Head of State.¹³ Yet even a seasoned public law academic would struggle to draw the Crown on this picture. Does the Crown comprise the Sovereign alone? Does it comprise the executive branch? If so, does it include the public sector? Or does it represent all three branches? The answer to a question as basic as this should not be so uncertain, and the fact that the Crown makes it impossible to give a precise answer is compelling reason for New Zealand to shift to a State theory that does.

¹² See Chapter 11.

¹³ For example, see Matthew Palmer “New Zealand’s constitutional system” (20 June 2012) *Te Ara – The Encyclopedia of New Zealand* <<https://teara.govt.nz>>. Various versions of this diagram exist. For another version, see Diana Salter “Three branches of government” *Decision Maker* <<http://decisionmaker.co.nz>>.

The second consideration is that the concept of the Crown has impeded cogent reasoning in judicial review and litigation against the government for almost 200 years. Courts get into “impossible tangles”¹⁴ about the nature of the Crown when explaining why a certain finding should or should not be made against a government entity. Government is a very real entity whose powers and actions have palpable consequences. The metaphysical arguments that characterises judicial reasoning about the government are both frustrating and unhelpful. The thesis offers a State theory that embodies government more straightforwardly and, it is hoped, will encourage more coherent judicial reasoning.

The third motivation behind this thesis is that the existing scholarship has only considered replacing the Crown with an alternative State theory in the context of republicanism.¹⁵ This is insufficient for two reasons. First, the focus in these works is to construct a republican constitution rather than to devise a more effective State theory than the Crown. There is a risk that many of the issues with the Crown would remain in the republican State, as the issues are unconnected with the monarchy.¹⁶ Secondly, even if a republican State avoids some of the Crown’s issues, the reforms would only be implemented if and when New Zealand becomes a republic. The present shortcomings would remain unresolved. This thesis proposes a State theory that New Zealand can adopt even without becoming a republic. Further, should New Zealand become a republic, the constitutional transition from monarchy to republic would be easier under the proposed State theory than the concept of the Crown.

1.3. Structure

¹⁴ Joseph, above n. 11, at 1154.

¹⁵ For example, see Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand* (Auckland University Press, Auckland, 2017) at 317-335; Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal* (Victoria University Press, Wellington, 2018) at 256 – 383; F M Brookfield “The monarchy and the constitution today: a New Zealand perspective” [1992] NZLJ 438.

¹⁶ See Section 11.8.1.

The thesis is divided into twelve chapters. Chapters 1 and 2 introduce the thesis and explain the methodology respectively. Chapter 3 defines the key concepts of State, Crown and government.

Chapters 4 to 10 analyse the concept of the Crown and expose the layers of incoherence that beset it. Chapter 4 studies the Crown's evolution from a medieval metaphor for kingship into an embodiment of modern government that also, confusingly, denotes the Sovereign as a corporation. Chapter 5 explores the uncertainty surrounding whether the Crown refers to the executive branch alone or embodies all three branches of government. Chapter 6 demonstrates the misalignment between the ambits of the Crown, the core executive and the wider public sector. These three chapters together highlight the difficulty with understanding what the Crown means.

Chapters 7, 8 and 9 examine the issues with Crown liability. Chapter 7 sets out how the common law erroneously interpreted the maxim "the king can do no wrong" to immunise the Crown from liability in tort. It shows that vestiges of the maxim remain under the Crown Proceedings Act 1950 and continue to impede findings of direct Crown liability. Chapter 8 criticises the Crown's immunity from mandatory orders. Chapter 9 questions the justification for the presumption that the Crown is exempt from statute.

Chapter 10 establishes that the Crown provides a unsatisfactory explanation for the sources of executive empowerment. It argues that statutory empowerment should replace both prerogative powers and the executive's residual freedom.

Chapter 11 proposes reform. It constructs an alternative State theory for New Zealand that defines the State more clearly, establishes a coherent framework of State liability and provides a more complete account of executive empowerment. Chapter 12 reflects on what the study has achieved.

Chapter 2: Methodology

2.1. Measures of effectiveness

The thesis assesses the “effectiveness” of the Crown and the proposed State theory against three measures: rationality, coherence and simplicity. The paragraphs below explain the choice of these measures.

Rationality signifies the need for a rational connection between a rule and the objective that the rule purports to achieve. In the context of a State theory, it is the question, “is rule X justified for government to carry out its functions?” A disjunction between the rule and professed rationale for the rule indicates either that the rule is not justified and should be discarded, or that the rationale should be amended to reflect the real reason the rule is justified. For example, the oft-touted reason for the Crown’s immunity from injunctions and specific performance is that the king’s courts cannot order the king.¹ The rationality of this rule can be challenged by pointing out that the executive is not the king and so should not automatically enjoy the same immunity as the king. The benefit of using rationality as a measure of a State theory’s effectiveness is that it encourages constitutional transparency surrounding the immunities and powers that attach to the executive and encourages weeding out any rules that are unjustified.

Coherence denotes logical consistency. A body of rules is incoherent if the rules are logically inconsistent with each other. Consider the rules of Crown liability: in contract, a breach of contract by an officer of the Crown leads to direct liability on the Crown’s part;² in tort, a tortious action by an officer generally leads to only vicarious liability on the Crown’s part.³ The inconsistency of these rules demonstrates confusion about whether or not the acts of officers of

¹ See Chapter 8.

² Janet McLean “The Crown in contract and administrative law” (2004) 24(1) OJLS 129 at 137.

³ Crown Proceedings Act 1950, s 6(1)(a); see Stuart Anderson “‘Grave injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009) 12(1) Otago L. Rev. 1 at 3; Rachael Baillie “A square peg in a round hole: reshaping the approach to systematic negligence in the modern public service” (2014) 20 Auckland U. L. Rev. 45.

the Crown are acts of the Crown. Incoherence is a telling indicator of ineffectiveness because it exposes lack of clear understanding, thereby signalling where reform is desirable.

The third value, simplicity, entails that a system should use as few rules as possible to achieve its objective. An example of a rule that offends simplicity is s 17 of the Crown Proceedings Act 1950. Section 17(1) states that an injunction or specific performance may not lie against the Crown and s 17(2) extends the same immunity to officers of the Crown where the effect of an order against the officer would be to enjoin the Crown. This rule necessitates the legal fiction that the Crown is a corporation sole comprising the monarch alone so that the courts can distinguish officers from the Crown.⁴ If s 17(2) did not exist, there would be no need for this legal fiction. Simplicity would therefore dictate repealing s 17(2). The value of simplicity is that it makes legal rules more direct and articulate.

This thesis does not claim to propose a State theory that is perfectly effective according to the measures of rationality, coherence and simplicity. What drives the argument for reform is that the proposed State theory would be significantly more rational, coherent and simpler than the Crown.

2.2. Rule of law

Achieving greater consistency with the rule of law motivates many of the proposals in this thesis. This section explains the concept of the rule of law, clarifies its meaning in this thesis and examines the justification for using it as a guiding principle for reform.

⁴ William Wade “The Crown – old platitudes and new heresies” (1992) 142 NLJ 1275 at 1276.

There is no “uncontroversial”⁵ definition of the rule of law. At its broadest, it means that no one is above the law.⁶ A meaning that is more specific to constitutional law is that the government is also subject to the law. Bradley and Ewing refer to the rule of law as “the notion of law as a primary means of subjecting governmental power to control.”⁷ Deinhammer writes that “[w]hether one is an official authority or a citizen, no one is above the law.”⁸ According to Tamanaha, “[t]he rule of law means that government officials and citizens are bound by and abide by the law.”⁹ Beyond the consensus on this basic meaning, however, there is a “rampant divergence of understandings”¹⁰ about what the rule of law entails. Different commentators have suggested different criteria for the concept.¹¹

2.2.1. Dicey’s three meanings

Perhaps the most influential account of the rule of law in common law jurisdictions comes from the English jurist Albert Venn Dicey. Dicey argued that there are “three distinct though kindred”¹² meanings of the rule of law. The first meaning is “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and [the] exclu[sion] [of] the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”¹³ The second meaning is “equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.”¹⁴ Thirdly, the rule of law means that “the general principles of the constitution (as for example the right to

⁵ Aleardo Zanghellini “The foundations of the rule of law” (2016) 28(2) Yale Journal of Law & the Humanities 213 at 213.

⁶ For example, see Joseph Raz “The rule of law and its virtue” (1977) 93 LQR 195 at 198; Thomas Bingham “The rule of law” (2007) 66(1) CLJ 67 at 68.

⁷ A W Bradley and K D Ewing *Constitutional and administrative law* (14th ed, Pearson Longman, Harlow, 2007) at 95.

⁸ Robert Deinhammer “The rule of law: its virtues and limits” (2019) 74(1) Obnovljeni život 33 at 34.

⁹ Brian Tamanaha “The history and elements of the rule of law” [2012] Singapore Journal of Legal Studies 232 at 233.

¹⁰ Brian Tamanaha *On the rule of law* (Cambridge University Press, Cambridge, 2004) at 3.

¹¹ John Alder *Constitutional and administrative law* (9th ed, Palgrave MacMillan, Hampshire, 2013) at 113.

¹² A V Dicey *Introduction to the study of the law of the constitution – Part II* (8th ed, MacMillan, London, 1915) at 110.

¹³ At 120.

¹⁴ Ibid.

personal liberty, or the right of public meeting) are...the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.”¹⁵ A cursory assessment of these three meanings follows.

Dicey’s first meaning promotes the ideal that the government should exercise its powers according to law instead of arbitrarily. It signifies that no one can suffer penalties except for a breach of law. This is to be contrasted with systems of government where those in authority exercise “wide or arbitrary powers of constraint, such as a power of detention without trial.”¹⁶

The first meaning is, however, susceptible to several criticisms. First, it is unclear what Dicey meant by “regular law”. There are different statutory regimes for many areas of law such as employment, human rights and immigration. The primary fora for dispute-resolution in these regimes are independent statutory bodies rather than the regular law courts.¹⁷ These regimes would appear not to be “regular law” according to Dicey; yet it would be odd to suggest that they contravene the rule of law.

Secondly, Dicey equates arbitrariness with discretion. Discretionary authority is an “inevitable”¹⁸ component of the powers of the modern executive. The extensive functions of the modern government would make it inefficient and, indeed, impossible for legislation to provide for every executive action and instance of decision-making.

Commentators point out Dicey’s political bias lurking behind his condemnation of discretionary authority; he “lived and died a Whig”¹⁹ and adhered to the Whig ideals of a minimalist State and

¹⁵ At 115.

¹⁶ Bradley and Ewing, above n. 7, at 96.

¹⁷ Philip Joseph *Administrative and constitutional law* (4th ed, Thomson Reuters, Wellington, 2014) at 173; Bradley and Ewing, above n. 7, at 97.

¹⁸ Bradley and Ewing, above n. 7, at 97.

¹⁹ Ivor Jennings *The law and the constitution* (5th ed, London, University of London Press, 1959) at 310, quoted in Joseph, above n. 17, at 172.

laissez-faire. He did not envisage a State with functions more complicated than the maintenance of law and order, taxation, defence and foreign relations.²⁰ The necessities of modern government contradict Dicey's conception of the rule of law.

Dicey's second meaning reflects the principle that no one is above the law.²¹ One of the implications is that officers should not enjoy special protection just because they are officers.²² In Dicey's words:²³

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

However, Dicey's endorsement of equality before the law appears to ignore the different legal rules that apply to different categories of persons.²⁴ For example, a landlord's legal duties are different from those of a tenant²⁵ and there are more restrictions on the liberty of a person who has been sentenced to home detention than a person who has not. Most people would agree that such differences are both necessary and appropriate. The principle of equality before the law is overly simplistic if taken at face value.

There is a parochial undertone to Dicey's view that equality before the law requires "ordinary law courts" to administer the "ordinary law of the land". Dicey believed that the unitary court system in the United Kingdom was inherently superior to the dual systems of administrative courts and ordinary civil courts in France. There was little empirical evidence to support this belief even in Dicey's time.²⁶ Since then, common law jurisdictions have witnessed the proliferation of

²⁰ Joseph, above n. 17, at 173.

²¹ Bradley and Ewing, above n. 7, at 97.

²² Ibid.

²³ Dicey, above n. 12, at 114.

²⁴ Joseph, above n. 17, at 176.

²⁵ Bradley and Ewing, above n. 7, at 98.

²⁶ Joseph, above n. 17, at 177.

statutory entities with adjudicative functions, such as the Employment Relations Authority and the Human Rights Review Tribunal. These statutory entities are not “ordinary courts” but extend the application of law to a wider range of the public because of their greater accessibility.

Dicey’s third meaning refers to his view that English courts protect constitutional principles on a case-by-case basis without any need for a codified constitution. The third meaning is difficult to justify. The requirement that constitutional principles should be protected by the common law as opposed to a codified constitution appears to have no relevance to the rule of law’s core principle that everyone must be subject to the law. Joseph comments that the third meaning “has little relevance to the rule of law doctrine and sits uncomfortably with [Dicey’s] first two meanings.”²⁷ One suspects that Dicey’s reason for including this meaning was purely parochial – a further attempt to exalt the common law. Moreover, Dicey’s faith in the common law’s capacity to uphold constitutional principles seems misplaced given that statute can amend or altogether abolish any common law principle. Bradley and Ewing recognise the “widely accepted” belief that “there is much value in a formal declaration of the individual’s basic rights”.²⁸

It is submitted that Dicey’s first and second meanings of the rule of law have more enduring relevance than the third. However, the preceding criticisms show that the first and second meanings cannot be accepted at face value and must be restated.

2.2.2. Restating the rule of law

The thesis draws on Dicey’s first and second meanings and the observations of later commentators to restate the “rule of law” as two principles. Later chapters rely on these principles when critiquing the legal framework within which the Crown operates.

²⁷ Ibid.

²⁸ Bradley and Ewing, above n. 7, at 98.

It is submitted that the first principle is that the law should be designed to minimise the potential for arbitrary or improper exercise of power. Discretion is inevitable²⁹ given the impossibility of regulating every single aspect of government decision-making. The legal framework need not minimise the role of discretion as long as it imposes controls over the exercise of discretion.³⁰ However, rules that make the question of executive compliance with laws a matter of discretion rather than obligation are deviations from this first principle. Chapter 8 relies on this principle to critique the Crown's immunity from mandatory orders, which effectively means that the Crown cannot be compelled to comply with Court rulings.

Secondly, it is submitted that equality before the law does not mean that everyone should have identical rights and obligations; rather it means that any aberration from the principle of equality should be justifiable with reference to functional need. Bradley and Ewing write that the question is not merely "what legal authority *does* the government have for its acts" but also "what powers ought the government to have".³¹ This implies that any privilege or immunity that attaches to the executive must be justifiable having regard to the functions that the executive has to carry out. Daintith and Page observe that the modern executive acts like a private corporation in many ways.³² Where this is the case, the default legal position should be that the executive must not have immunities that private corporations do not unless there is a specific public policy consideration that justifies the immunity. Even where the executive is carrying out a function that is unique to government, the powers, privileges and immunities that apply should be determined by what is necessary for the executive to carry out the function effectively. Chapters 7, 8 and 9 use this second principle to challenge the lack of direct Crown liability in tort, the aforementioned immunity from mandatory orders and the presumption that the Crown is exempt from statute.

²⁹ At 97.

³⁰ See Joseph, above n. 17, at 173 – 175.

³¹ Bradley and Ewing, above n. 7, at 101 [Emphasis in original].

³² Terence Daintith and Alan Page *The executive in the constitution* (Oxford University Press, Oxford, 1999) at 207 – 211.

2.3. Treatment of primary and secondary sources

This thesis does not have a separate section on literature review. Instead, the relevant literature is discussed in the context of specific arguments in later chapters. The reason is that the thesis relies equally on primary and secondary legal sources. Primary legal sources are the cases, legislation and official reports that contain the actual law or legal practice.³³ Secondary sources provide commentary on the law with reference to primary sources and other secondary sources.³⁴ Literature reviews are more suitable for reviewing secondary rather than primary sources because commentary on primary sources would be classified, not as literature review, but as original research.

It is not possible to separate primary from secondary sources in discussions of the legal concept of the Crown. How else would the Crown be understood except with reference to the academic commentaries that have given meaning to the cases? Maitland devised the analogy of the Crown as corporation aggregate³⁵ but this analogy is now part of the legal orthodoxy following its adoption by the House of Lords in *Town Investments Ltd v Department of the Environment*.³⁶ Academic commentary and judicial reasoning form a two-way interchange in the development of the Crown, causing secondary and primary sources to meld. Any attempt to set out the relevant literature in a separate section would reveal only part of the existing body of understanding on which the thesis builds. Thus, the thesis discusses the relevant primary and secondary sources alongside the specific analyses that rely upon these sources.

2.4. Use of historical analysis

³³ Law Foundation “New Zealand Law Style Guide” (2nd ed) The Law Foundation New Zealand <www.lawfoundation.org.nz>

³⁴ Ibid.

³⁵ FW Maitland “Crown as Corporation” in FW Maitland and HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press, London, 1911) 244 at 247.

³⁶ *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813 (HL) at 820 per Lord Diplock and at 833 per Lord Simon.

2.4.1. Relevance of history

The concept of the Crown originated in 11th century England³⁷ and has remained part of the legal discourse ever since except for a brief interlude of republicanism in the mid-17th century. The Crown's ancientness and continuity mean that its present features are derivatives of older legal reasonings.

This in turn means that some of the confusions in the Crown have older origins than is commonly believed. For example, Wade considers that the debate over whether the Crown is a corporation sole or corporation aggregate originates from the House of Lords' decision in *Town Investments Limited v Department of the Environment*;³⁸ he asserts that older judicial authority uniformly to point to the Crown as a corporation sole.³⁹ The historical study in this thesis finds that the idea of the Crown as a corporation aggregate arguably pre-dates the corporation sole.⁴⁰ It further reveals that judges from the mid-19th century onward have vacillated between conceptualising the Crown as the Sovereign alone – that is, as a corporation sole – and describing it as embracing the “great departments of the State”⁴¹ – in other words, a corporation aggregate.⁴² The older origin of the corporation aggregate challenges Wade's claim that the corporation sole is historically a more accurate conceptualisation.

A second example of the value of historical analysis is the assessment of the effectiveness of the Crown Proceedings Act 1950. Some commentary suggests that the Crown Proceedings Act has resolved the issues with the Crown by making the Crown suable and liable for damages in tort.⁴³

³⁷ See Section 4.2.

³⁸ Wade, above n. 4. At 1275.

³⁹ William Wade “Crown, ministers and officials: legal status and liability” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 23 at 24.

⁴⁰ See Chapter 4.

⁴¹ *Mersey Docks and Harbour Board Trustees v Cameron* [1864-65] 11 Eng. Rep. 1405 at 1412 *per* Blackburn J.

⁴² See Section 8.3.1.

⁴³ For example, see Thomas Barnes “The Crown Proceedings Act, 1947” (1948) 26 Can. B. Rev. 387; Editorial “The Crown Proceedings Act, 1950” (1952) 28(2) NZLJ 17.

The historical study shows that statute has failed to clarify many of the 19th century confusions surrounding the Crown, which continue to impede a coherent framework of Crown liability.

The preceding two examples show that the historical study is integral to understanding the deep roots of the confusions that afflict the Crown. Understanding the origin of the confusions helps assess whether a proposed reform will uproot the confusion or be mere cosmetic surgery.

2.4.2. Applied legal history

A suitable methodology is essential for robust historical legal study. Lobban states, “A range of methodological presuppositions...lies behind any historian’s research,”⁴⁴ and “the historian should seek to be aware of and articulate his methodological presuppositions”.⁴⁵ Methodological awareness – especially an awareness of the method’s limits – encourages the researcher to avoid the typical pitfalls that lead to misinterpretations of the past.

The thesis uses mainly the method of historical legal research known as “applied legal history”. This involves an examination of the history of law with a view towards enriching one’s understanding of the present body of law. Brophy describes applied legal history as “deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues.”⁴⁶ He calls it a “self-conscious engagement with the present” while “turning to history in law”.⁴⁷

Applied legal history is a method with some pedigree, albeit the literature on it is scant. Holdsworth described it as a study that was “not only a complete statement of the law, but a complete history by the process by which that present state was reached.”⁴⁸ Such a study enables

⁴⁴ Michael Lobban “Introduction: the tools and the tasks of the legal historian” in Andrew Lewis and Michael Lobban (eds) *Law and history* Volume 6 (Oxford University Press, Oxford, 2004) 1 at 24.

⁴⁵ At 24-25.

⁴⁶ Alfred L. Brophy “Introducing applied legal history” (2013) 31(1) *American Society for Legal History* 233 at 233.

⁴⁷ At 233.

⁴⁸ William Holdsworth *The historians of Anglo-American law* (Columbia University Press, New York, 1928) at 108.

the reader to see not only “the rule”, but also “the reason for the rule...”⁴⁹ Lobban also recognises the legitimacy of historical research that aims to answer modern questions.⁵⁰

[The legal historian’s] task is not that of the antiquarian...Historians define their subjects of study by the questions which they set themselves, questions which may be shaped by the fact that they are of contemporary relevance...the questions the legal historian asks, and the approaches he takes, may reflect his attitude to how contemporary society should address policy questions.

The choice of applied legal history as research method is appropriate for this thesis given that the historical research is ultimately for the purpose of critiquing the modern concept of the Crown as a State theory. The present-facing nature of the research means that the thesis discusses only those aspects of the history of the Crown that are integral to understanding why the concept of the Crown has taken its modern shape. For example, Chapter 7 examines in detail three 19th century cases that extended the maxim “the king can do no wrong” to the Crown qua executive. The historical analysis reveals the confusion between the Sovereign and the executive in these cases. The chapter subsequently uses this finding to criticise the Crown’s present immunity from direct liability in tort, which is a residue of the maxim that the king can do no wrong.

One danger of using applied legal history is that it risks becoming “law office history” if poorly executed.⁵¹ The phrase “law office history” pejoratively refers to the practice of doing historical research for the purpose of finding precedents that advocate a specific argument in a current debate, without ensuring that the so-called precedents historically held the meaning that the researcher is attributing to them for the purpose of advocacy. Lobban cautions against

⁴⁹ Ibid.

⁵⁰ Lobban, above n. 45, at 23.

⁵¹ Brophy, above n. 47, at 234; Bill Davies “Why EU legal history matters – a historian’s response” [2013] 28(5) *Am. U. Int’l L. Rev.* 1337 at 1350.

“import[ing] anachronistic concepts to help make the best interpretation.”⁵² To avoid this risk, the researcher must “ask[] questions about meaning to the framing generations” and “put[] into context the issues that the framing generation faced.”⁵³ In other words, “[h]istorians should rather seek to make the interpretation which best reflects what contemporary agents understood the law to be.”⁵⁴

This thesis is conscious of the risk of anachronistic interpretation as it critiques the reasoning that earlier generations of lawyers applied to the Crown. It is an especially valid concern in the context of assessing how the Crown embodied “government”. Chapter 3 will define “government” as all three branches – the legislature, the executive and the judiciary – and the public sector. Further, “government” evokes the image of a system of administration with centralised control. However, this understanding of government did not develop until at least the mid-19th century. McLean has observed that early Victorian understanding of “government” must take into account the view that much of public power was decentralised and exercised by county courts and local councils as opposed to a “central” government.⁵⁵ Further, the concept of “public” and “private” was blurred in that private enterprise and charitable organisations carried out many of the functions now considered “public”, such as welfare, education and the laying of infrastructure.⁵⁶ In fact, cases such as *Mersey Dock v Cameron*⁵⁷ were themselves part of the process of determining the relationship between “the Crown”, the government, and the idea of “publicness”.⁵⁸ It would be fallacious to impose a modern meaning of government to judge the legal reasoning in historic cases, where the political reality was different.

⁵² Lobban, above n. 45, at 5.

⁵³ Brophy, above n. 47, at 234.

⁵⁴ Philip Handler “Legal history” in Dawn Watkins and Mandy Burton (eds) *Research methods in law* (2nd ed, Routledge, 2017), Chapter 5 (ebook).

⁵⁵ Janet McLean *Searching for the State* (Cambridge University Press, Cambridge, 2012) at 21 – 39.

⁵⁶ At 143-148.

⁵⁷ *Mersey Docks*, above n. 42.

⁵⁸ McLean, above n. 56, at 142.

The thesis uses two techniques to avoid anachronistic interpretation. First, it takes into account the political and administrative reality at the time of the legal reasoning under scrutiny. It does so by relying on published research that addresses the political and administrative aspects of the evolution of government in the 18th and 19th centuries. This helps to ensure that the understanding of government is closer to the understanding that the “framing generation” held. Secondly, the chapter assesses the coherence of the historic concept of the Crown by looking for internal logic and the consistency of coexistent rules. This technique should be immune from criticisms of anachronism as it involves a “cross-sectional” study of the Crown for a given time period, with only contemporaneous points of reference to assess conceptual clarity.

2.4.3. Internal and external legal history

Historical legal method commonly falls into one of two categories: internal or external legal history. Ibbetson describes internal legal history as follows:⁵⁹

Internal legal history...deals with law on its own terms, its sources are predominantly those thrown up by the legal process – in England, that is, the records of courts, law reports and legal treatises – and its practitioners are as often as not trained lawyers, or at least scholars whose discipline is law.

Gordon provides a similar definition of internal legal history, observing that “[t]he internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain...”⁶⁰

⁵⁹ David Ibbetson “What is legal history a history of?” in Andrew Lewis and Michael Lobban (eds) *Law and history* (Oxford University Press, Oxford, 2004) 33 at 34.

⁶⁰ Robert W Gordon “Introduction: J Willard Hurst and the common law tradition in American legal historiography” (1975) 10 *Law & Soc’y Rev* 9 quoted in Kunal M. Parker “Law ‘in’ and ‘as’ history: the common law in the American polity, 1790-1900 [2011] 1(3) *UC Irvine Law Review* 587 at 587.

By contrast, external legal history is “the practice of revealing law to be nonautonomous [sic], hence political, by situating it in context.”⁶¹ It is:⁶²

...the history of law as embedded in its context, typically its social or economic context. Its sources are not, or not simply, those thrown up by the legal process...It is the way that law operates in society, which seems to have law as the given and its operation as the thing that needs to be examined.

The historical study in this thesis has elements of both internal and external legal historical methods. One of the contentions of this thesis is that the Crown failed to keep up with political reality. That is an external legal argument because it refers to the political and administrative framework of government and contends that the law ought to have accommodated that instead of operating within its own framework of legal continuity. On the other hand, the thesis is on the legal concept of the Crown. It often explores legal reasoning in historic cases to understand the source of present confusions. Internal legal history therefore forms a significant part of the analysis.

One risk to be wary of when undertaking an internal legal historical research is that what amounts to a “legal” source varies across time. The modern understanding of what is “law” in England and most Commonwealth jurisdictions involves a unitary rule of recognition. However, rules of recognition change, and the likelihood of encountering multiple rules of recognition in the same jurisdiction increases the farther back in history one goes. Ibbetson says:⁶³

[T]he real problem is to decide what we mean by law...the problem of identifying the criteria according to which the validity of rules is assessed. The further back in time we go, the harder it becomes to identify any Rule of Recognition precise enough to be useful.

⁶¹ Parker, above n. 61, at 591.

⁶² Ibbetson, above n. 60, at 33.

⁶³ At 34.

The thesis encounters this problem when tracing the origins of the Crown prior to its appearance in case law in the late 15th century. Case law is part of the common law of the land and its legal status cannot be disputed. However, the legal status of the medieval discourse on the king's two bodies and his obligations to the Crown are more ambiguous. Kantorowicz had described this as "medieval theology".⁶⁴ Maitland called it "metaphysics".⁶⁵ It is difficult to categorise as law. The thesis confronts this problem by acknowledging that the origins of the Crown were non-legal before it became a legal concept. That does not mean that the discussion on the Crown in its pre-legal phase is any less important. The pre-legal phase left a permanent mark on the concept of the Crown by causing it to imbibe a chameleon nature that was capable of meaning several contradictory things at the same time.

2.5. Use of cross-jurisdictional law and commentary

The thesis uses cross-jurisdictional law and commentary on the concept of the Crown from the United Kingdom and its former colonies. This approach warrants some explanation.

The historical legal development of the Crown in England is relevant because New Zealand law imported the Crown from English law and therefore inherited many pre-existing confusions.⁶⁶ Studying the English origins of the Crown is vital to understanding the present-day confusions.

English law is also relevant to New Zealand law in the context of the Crown's immunity from mandatory orders. Section 17 of the Crown Proceedings Act 1950, which immunises the Crown from specific performances and injunctions, is identically worded to s 21 of the Crown Proceedings Act 1947 (UK). Both sections have prompted similar confusions regarding when an

⁶⁴ Ernst Kantorowicz *The king's two bodies: a study in medieval theology* (Princeton University Press, Princeton, 1957).

⁶⁵ Maitland, above n. 36, at 249.

⁶⁶ Anderson, above n. 3, at 18.

order against a minister amounts to an order against the Crown.⁶⁷ English case law⁶⁸ and commentary⁶⁹ that illustrate or examine these confusions are therefore useful when considering the scope of the confusions in New Zealand.

Commentary on Crown liability in 19th century Australia is relevant when analysing the New Zealand framework for Crown Liability from the same period.⁷⁰ Australian colonies were pioneers in making the Crown liable in suit and in tort, and New Zealand followed soon after.⁷¹ Both Antipodean colonies had a similar insight into the difference between the Crown qua executive and the Crown qua Sovereign because of the similar demands on the colonial governments to undertake works that were left to private institutions in the United Kingdom.⁷²

The thesis draws on Australian and Canadian commentary when discussing issues that are common to these jurisdictions and New Zealand. These include the difficulty in determining whether an entity is the Crown⁷³ and the presumption that the Crown is exempt from statute.⁷⁴ A caveat when using Australian and Canadian commentary is that these jurisdictions operate under a federal system of government in contrast to the unitary system in the United Kingdom and New Zealand. The Crown in Australia and Canada is “subdivisible”:⁷⁵ there is a Crown in

⁶⁷ See Chapter 8.

⁶⁸ For example, *Merricks v Heathcote-Amory* [1955] Ch. 567; *R v Transport Secretary, ex parte Factortame Ltd* [1990] 2 AC 85; *M v Home Office* [1994] 1 AC 377.

⁶⁹ For example, Wade, above n. 4; Stephen Sedley “The Crown in its own courts” in Christopher Forsyth and Ivan Hare (eds) *The golden metwand and the crooked cord* (Oxford University Press, Oxford, 1998) 253.

⁷⁰ For example, see P D Finn “Claims against the government legislation” in P D Finn (ed) *Essays on Law and Government Volume 2 – The citizen and the State in the courts* (LBC Information Services, New South Wales, 1996) 25; P W Hogg “Victoria’s Crown Proceedings Act” [1970] Melb. U. L. Rev 342 at 342-344.

⁷¹ See Chapter 7.

⁷² Anderson, above n. 3, at 10-11.

⁷³ See Chapter 6; relevant commentary from Australia and Canada include Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013) at 4.4 to 4.10; Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) Chapter 16.

⁷⁴ See Chapter 9. Relevant commentary from Australia and Canada include New South Wales Law Reform Commission “Proceedings by and against the Crown” (LRC 24, 26 February 1976) at Section 13; Ontario Law Reform Commission “Report on the liability of the Crown” (1989) at Chapter 7; Law Reform Commission of Saskatchewan “Presumption of Crown immunity – consultation paper” (October 2012).

⁷⁵ *Mellenger v New Brunswick Development Corp* [1971] 1 WLR 604 (CA); Joseph, above n. 13, at 618.

respect of the government of each state or province in addition to the federal Crown. Federalism poses issues that are irrelevant in a New Zealand context, such as whether references to the Crown in a statute denote the legislating government only or include the governments of other states and provinces.⁷⁶ Further, federalism changes the debate surrounding the nature of the Crown in Australia. Seddon considers that “the conception of the state as legal entity – the body politic – [has been] much clearer in Australia”⁷⁷ because federalism has necessitated the recognition that each state is a separate legal person and so is the Commonwealth. The thesis remains mindful of these differences when applying Australian and Canadian commentary to the New Zealand context.

Draft proposals for an alternative State theory contemplated importing principles from non-common law jurisdictions to remedy the deficiencies in New Zealand’s framework of government liability. Discarded proposals include a concept of institutional liability based on the French *faute de service publique*⁷⁸ and an “organic identity” theory deriving from the Italian framework of public body liability, which treats the act or omission of any public official as an act or omission of the public body itself.⁷⁹ The final proposal omits these concepts in favour of direct State liability.⁸⁰ This is because direct State liability provides a satisfactory solution to the problems that New Zealand law experiences⁸¹ and has the added advantage of being a familiar concept in the context of *Baigent* damages.⁸² As a result, it has not been necessary to discuss law and commentary from non-common law jurisdictions in the final version of this thesis.

⁷⁶ Hogg, above n. 74, at 452.

⁷⁷ Nicholas Seddon “The Crown” (2000) 28 Fed. L. Rev. 245 at 249.

⁷⁸ Marie-Aimée de Latournerie “The law of France” in John Bell and Anthony W. Bradley (eds) *Government liability: a comparative study* (The United Kingdom National Committee of Comparative Law, London, 1991) 200 at 205.

⁷⁹ Marcello Clarich “The liability of public authorities in Italian law” in John Bell and Anthony W. Bradley (eds) *Government liability: a comparative study* (The United Kingdom National Committee of Comparative Law, London, 1991) 228 at 231.

⁸⁰ See Section 11.5.1.

⁸¹ *Ibid.*

⁸² *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667; see Section 5.3 and Section 11.5.1.2.

Chapter 3: Definitions

3.1. Overview

The purpose of this chapter is to define the concepts that the thesis will use to assess the Crown's effectiveness as a State theory. This chapter defines the "State" and the related concepts of "government", "executive", and "public sector". The chapter clarifies the thesis's decision to treat the Crown as a State theory instead of an alternative to the State.

3.2. The State

"State" in this thesis means the concept that embodies the government in domestic law. A "theory of the State" accordingly refers to the principles underpinning how the domestic law embodies government.

The definition of State reflects two methodological choices. The first is that the definition is "functional" as opposed to "substantive": it describes what the concept of State does – i.e. it embodies government – rather than what the State deems the government's role to be. The reason is that substantive definitions of the State are notoriously diverse. They are ideologically-driven¹ and vary from one nation to another.² The thesis seeks to use the State as an analytic tool to construct an effective State theory for New Zealand. This requires using the term "State" without presuming that it has certain substantive features. The principles that this thesis proposes for New Zealand's State theory are motivated by the overarching objective of promoting rationality, coherence and simplicity in New Zealand's constitutional arrangements.

The second choice is that the thesis does not deal with the concept of State in international law. This is because the international and domestic legal concepts of the State serve different purposes. In international law, the concept of State exists to enable nations to interact with each

¹ Quentin Skinner "A Genealogy of the Modern State" (2009) 162 *Proceedings of the British Academy* 325 at 326.

² For example, see Kenneth Dyson *The State Tradition in Western Europe* (Martin Robertson, Oxford, 1980) at 225.

other as legal persons. In domestic law, the State exists largely to enable the government to interact with individuals and private bodies. The power dynamics and context of the interactions are dissimilar and make international law's understanding of the State irrelevant to this thesis.

3.3. Is the Crown a State theory?

One methodological challenge has been to determine whether the thesis should treat the Crown as a theory of the State or present the Crown and the State as opposing traditions. This choice has significant terminological implications. It affects whether the thesis should refer to “a shift from the Crown to *the* State” or use the language of “a shift from the Crown to *an alternative* State *theory*”.

At first sight, many academics seem to treat the Crown and the State as alternatives. For example, Maitland described English law's use of the Crown as an attempt to “get on without the State”.³ Joseph writes of the Crown having “substituted” for a State theory⁴ and existing “in lieu of the State”.⁵ Similar language abounds.⁶ However, closer examination reveals that these references to “the State” denote the European State tradition rather than the legal embodiment of the apparatus of government. Maitland's comment appeared in the course of his broader complaint that English law refused to personify the State and instead “parsonified”⁷ the monarch as the Crown to represent government. It is implicit in his argument that the Crown is the British attempt to fulfil the function of legally embodying government in the same way that the State embodies government according to the European State tradition. Likewise, Joseph has acknowledged that the Crown is “the legal embodiment” of the State.⁸ Ultimately, a functional

³ FW Maitland “Crown as Corporation” in FW Maitland and HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press, London, 1911) 244 at 253.

⁴ Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 634.

⁵ At 634.

⁶ For example, see Janet McLean *Searching for the State in British Legal Thought* (Cambridge University Press, New York, 2012) at 3.

⁷ Maitland, above n. 3, at 245.

⁸ Joseph, above n. 4, at 1182; see also at 612.

definition of the State must admit that the Crown is a theory of the State because the Crown, too, is an attempt to provide the apparatus of government with a legal personality.

3.4. Government

It is necessary to understand what government is to assess how effectively a State theory embodies the government. This section defines government in New Zealand to enable subsequent chapters to examine how much of “government” the Crown captures and what an alternative State theory should aspire to include within its definition. It also identifies the uncertainty about whether or not the public sector is part of, or sits outside, government.

“Government” encompasses the legislature, judiciary and executive. The legislature and the judiciary are easily recognisable: they refer respectively to Parliament and the court system. The executive branch is more difficult to identify. At the very least, the executive includes the Sovereign or her representative in New Zealand, the Governor-General, the Prime Minister, ministers, Cabinet, the Executive Council and government departments. These are the core institutions of central government. There are numerous other organisations such as the Police and Armed Forces, local government, statutory bodies, government-owned companies, Universities and school boards of trustees. These entities are part of what is variously called the “public sector”, “public sphere” or “State sector”.⁹ They operate under a spectrum of ministerial control – from high to none at all.¹⁰ It is uncertain whether these public sector entities fall within the ambit of the executive.

One manifestation of the uncertainty is the conflicting judicial authorities on whether or not a public entity is subject to the New Zealand Bill of Rights Act 1990 through s 3(a) or s 3(b) of the Act. Section 3 of the New Zealand Bill of Rights Act 1990 provides:

⁹ State Services Commission “New Zealand’s State sector – the organisations” (1 February 2018) <<https://www.ssc.govt.nz>>.

¹⁰ See Crown Entities Act 2004, s 7; State Services Commission “A guide to New Zealand’s central government agencies” (1 November 2016) <<https://www.ssc.govt.nz>>.

3 Application

This Bill of Rights applies only to acts done –

- (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Section 3(a) extends the Bill of Rights Act to the “executive” whereas s 3(b) extends the Act to entities that perform public functions, powers and duties but are not part of the “executive”. Butler notes that there is “little judicial appreciation” of the different applications of ss 3(a) and 3(b), as a result of which there has been “confused case law” surrounding the ambit of the executive.¹¹ For example, some cases have held that the Police are within the ambit of s 3(a) (that is, they are part of the executive branch),¹² whereas other cases have held that they fall within s 3(b) (that is, they are part of the public sector rather than the executive branch).¹³

The uncertainty about the ambit of the executive branch is also apparent in New Zealand’s leading public law textbook.¹⁴ Joseph states that there are “public bodies that fall *outside* the orbit of executive government, such as schools, universities and other educational establishments.”¹⁵ Yet elsewhere, he writes that the entities listed in the schedules to the Ombudsmen Act 1975 and the Official Information Act 1982 (which include school boards of trustees and education authorities) are “within the province of executive government”.¹⁶

3.5. Terminological choices

¹¹ Andrew Butler “Is this a public law case” (2000) 31 VUWLR 747 at 754.

¹² *R v N* [1999] 1 NZLR 713 at 718.

¹³ *Noort v MOT; Curran v Police* [1992] 3 NZLR 260 at 282 (CA); *Littlejohn v Ministry of Transport* [1990-1992] 1 NZBORR 285 at 299 (HC); *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667 at 714, per Gault J (CA).

¹⁴ Joseph, above n. 4.

¹⁵ At 1182 [emphasis in original].

¹⁶ At 201.

Legal parlance often uses the term “government” to mean the executive government. For clarity, this thesis generally uses the word “executive” or “executive government” to denote specifically the executive branch and “government” when referring to all three branches. Quotations and common phrases such as “central government” occasionally contain the word “government” to denote the executive; the thesis does not provide clarification of such usage unless the context leaves scope for ambiguity.

Chapters 1 to 10 use the words “executive” and “public sector” fluidly without denoting that there is a specific boundary between them. Where the thesis intends to distinguish between the two, it uses the expression “wider public sector” to denote an indefinite subset of public entities which are outside the ambit of the executive government. The lack of precision is unavoidable because the boundary is not clear.

Chapter 11 proposes definitions for the executive and public sector as part of the alternative State theory. Chapters 11 and 12 use the terms “executive” and “public sector” consistently with the proposed definitions.

Chapter 4: The Sovereign and the government

4.1. Overview

Whether the Crown denotes the Sovereign acting officially or the government is fundamentally ambiguous. This chapter examines why the ambiguity exists by tracing the Crown's evolution from a medieval metaphor for kingship to the modern embodiment of government in the United Kingdom and New Zealand.

The chapter argues that the present ambiguity is the result of imprecise usage of the term "Crown" throughout history. The medieval Crown was a composite entity comprising the king and his realm. Sixteenth and 17th century lawyers fused the distinct concepts of "Crown" and "the king's body politic", making the Crown synonymous with the king as a corporation sole. This fusion gave the Crown a paradoxical nature: it allowed the Crown to denote both, the king, and a concept broader than the king.

The paradox has been a convenience and a curse. It has made the Crown an emblem of constitutional continuity by giving it sufficient flexibility to capture the growing apparatus of government while continuing to denote the Sovereign. However, the paradox has also impeded the Crown's modernisation. Maitland's attempts to reconceptualise the Crown as a corporation aggregate¹ have foundered against the resilience of the corporation sole analogy. As a result, modern English and New Zealand law have not been able to give the government a legal personality distinct from the Sovereign.

4.2. Origins of the Crown

This section shows that the Crown began as a metaphor of kingship that transcended the king. The medieval Crown had similarities with the modern understanding of a corporation aggregate

¹ FW Maitland "Crown as Corporation" in FW Maitland and HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press, London, 1911) 244 at 247.

because it was a composite entity comprising the king and his realm or the king and his parliament. This contrasts with the later understanding that the Crown was a corporation sole before it became a corporation aggregate.²

4.2.1. Metaphor for kingship

There is no evidence that the term “crown” denoted anything other than a physical object before the Norman Conquest.³ Edward the Confessor, and possibly rulers before him, wore a crown on ceremonial occasions but no symbolic significance was attached to it.

Maldicott surmises that the Crown transformed from an object to a metaphor because the Norman Conquest made it important to nurture visual links between Norman rule and the rule of past kings. William the Conqueror used the ceremonial crown-wearing occasions to foster an impression of continuity with the ceremonies of Edward the Confessor and emphasise his claims to legitimacy as Edward’s heir.⁴

The earliest records of metaphorical usage of the Crown appear in Eadmer’s *Historia Novorum in Anglia*,⁵ written between 1095 and 1123.⁶ Eadmer recorded William II as describing an act of challenge to his exclusive authority as no less than an attempt “to remove [his] Crown.”⁷ The king’s supporters described the Crown as “the ornament of [the king’s] rule”.⁸ The act of detracting from “the customs of the royal dignity” was paramount to taking from the king “the

² William Wade “The Crown – old platitudes and new heresies” (1992) *New Law Journal* 1275 at 1275; William Wade “Crown, ministers and officials: legal status and liability” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 23 at 24.

³ George Garnett “The origins of the Crown” (1996) 86 *Proceedings of the British Academy* 171 at 173.

⁴ Christopher Daniell *From Norman Conquest to Magna Carta: England 1066 – 1215* (Routledge, London, 2003) at 21.

⁵ Garnett, above n. 3, at 173-174.

⁶ Antonia Gransden *Historical writing in England I c. 550 to c. 1307* (Routledge, London, 1974) at 115.

⁷ Garnett, above n. 3, at 175.

⁸ *Ibid.*

crown and the kingdom.”⁹ In these references the Crown served as a metaphor for the king’s dignity and exclusive powers.

Garnett suggests that the rendering of the Crown into a metaphor also provided a convenient “abstract subject for the king’s rights, distinct from the king himself.”¹⁰ The need for such an abstract subject of rights arose from the fact that the king was mortal but commonly donated gifts in perpetuity to churches, which were perpetual donees.¹¹ Conceiving of the Crown as a perpetual entity rendered it capable of honouring the king’s perpetual gifts. As an example, the future Henry II could promise several grants to sundry abbeys in the name of the Crown at a time when he was yet to be the wearer of the physical crown.¹² The Crown represented the continuity of kingly authority as distinct from the mortality of the king himself.

4.2.2. The Crown transcends the king

Between the 12th and 13th centuries, the Crown began to suggest an entity that was “somehow separate from [the king’s] natural body” and reflective of “a more general public, governmental or administrative sphere.”¹³ This was the origin of the idea that the Crown was larger than, and therefore distinct from, the king.

The distinction was palpable in the context of taxation and crime. A treatise from 1177 distinguished between revenues “pertain[ing] to the Crown” and revenues owed to the king as a landlord, “not by right of the royal Crown but by that of some barony.”¹⁴ Crimes with a public

⁹ Ibid.

¹⁰ At 208.

¹¹ At 209.

¹² At 211-212.

¹³ John Allison *The English historical constitution* (Cambridge University Press, Cambridge, 2009) at 50.

¹⁴ Ernst Kantorowicz *The king’s two bodies: a study in medieval theology* (Princeton University Press, Princeton, 1957) at 343.

element, such as a breach of the king's peace, were classified as "pleas belong[ing] to the king's Crown."¹⁵ In the words of Bracton:¹⁶

Those things...that concern jurisdiction or that concern the peace belong to no one, but only to the king's crown and dignity, and they can not be separated from the crown, since they make the crown, for the king's crown is to do judgment and justice and keep the peace.

These descriptions of the "Crown" depicted it as an abstraction of the king's responsibility to govern and administer justice.

The Crown's embodiment of kingly responsibilities made it a useful term to invoke when one sought to control the king's actions. Since at least 1274, the monarch's coronation oath contained a pledge to preserve the rights of the Crown.¹⁷ There was a view that the Crown was a perpetual minor and the king, its guardian, so that the king could not alienate the Crown's properties or rights.¹⁸ This view could even legitimise anti-king rhetoric when taken to an extreme: the noblemen who accused Edward II of being an unfit ruler used the expression that the Crown was being enfeebled by the king.¹⁹ Similarly, the charges laid against Richard II that led to his deposition in 1399 included counts of jeopardising "the freedom of the Crown of England", squandering the Crown's property and disinheriting the Crown.²⁰ The Crown represented the "fundamental rights and claims of the country"²¹ that the king could not alienate.

4.2.3. Early glimpses of a corporation aggregate

¹⁵ Ranulf Glanvill *Tractatus de Legibus*, cited in F Pollock and FW Maitland *The History of English Law before the time of Edward I – Volume I* (2nd ed, Cambridge University Press, Cambridge) 1898 at 165.

¹⁶ Pollock and Maitland, above n. 15, at 572.

¹⁷ Allison, above n. 13, at 50-51.

¹⁸ Janet McLean "The Crown in contract and administrative law" (2004) 24(1) OJLS 129 at 149.

¹⁹ Michael Prestwich *Plantagenet England 1225 – 1360* (Oxford University Press, Oxford, 2005) at 35.

²⁰ Kantorowicz, above n. 14, at 369.

²¹ At 347.

Numerous references to the Crown between the 14th and 16th centuries describe it as the body politic of the nation.²² The body politic had the nature of a *universitas* or a corporation of many – foreshadowing the later concept of a corporation aggregate.²³ Many viewed the Crown as a composite organism – an incorporation of the king, the Lords and the Commons as one body, of which the king was the head.²⁴ Kantorowicz records a statement by the Bishop of Exeter in 1337 that “the substance of the nature of the Crown is found chiefly in the person of the king as head and of the peers as members.”²⁵ Henry VIII’s address to the Commons echoed the same metaphor: “At no time do we stand so highly in our estate royal as in the time of parliament, wherein we as head and you as members are conjoined and knit together in one body politic.”²⁶ In 1522, Fineux CJ described Parliament as a “corporation” of the “king and the lords and the commons”.²⁷

On occasions, the body politic of the Crown became an analogy for the realm itself. The Bishop of Bath and Wells said in 1436, “In the figure of the Crown, the rule and polity of the realm are presented”.²⁸ Kantorowicz writes, “There can be no doubt that in the later Middle Ages the idea was current that in the Crown the whole body politic was present – from king to lords and commons and down to the least liege-man.”²⁹

The preceding discussion establishes that the medieval Crown did not embody the king alone; it transcended the king. In particular, the organological analogy of the Crown as comprising a head and body meant that the king, as head, was only one part of the Crown. The “body”, comprising

²² At 207 to 231.

²³ Ibid; Allison, above n. 13, at 51. The term “corporation aggregate” existed by the 17th century because Sir Edward Coke describes certain entities as corporations aggregate in *The case of Sutton’s hospital* (1612) 77 Eng. Rep. 960 at 968.

²⁴ Janet McLean “‘Crown him with many crowns’: the Crown and the Treaty of Waitangi” (2008) 6 NZJPI 35 at 42.

²⁵ Kantorowicz, above n. 14, at 362.

²⁶ At 228.

²⁷ Maitland, above n. 1, at 247.

²⁸ Kantorowicz, above n. 14, at 363.

²⁹ At 363.

the Lords and Commons or the entire realm, was the other part of the Crown and as such was distinct from the king.

The organological analogy foreshadowed Maitland's proposal – several centuries later – that the State comprised the Sovereign as the head of a complex and highly organized “corporation aggregate of many”.³⁰ Maitland was evidently aware of the organological analogy, as he referred to Henry VIII and Fineux CJ's speeches in his essay.³¹ He was not suggesting a novel conception of the Crown but an ancient one that pre-dated Coke's corporation sole.

4.3. The fusion of Crown and king

A series of cases in the late-Tudor and early Stuart era conflated the king and the Crown and turned the Crown into a corporation sole comprising the monarch alone. The Crown came to embody the king, instead of the Crown serving as the embodiment of the king and government.

There were three driving factors behind the fusion of the Crown and king. The first was the confusion of the Crown as the body politic of the nation with the separate notion of the king's body politic. The second was the proposition that the king's body politic was inseparable from his body natural. The third was the theory that the king was a corporation sole. The combined result of these three factors was that the king as a corporation sole subsumed the Crown as a composite of the king and realm. The Crown could from then on equally refer to the monarch alone or the monarch and the wider government. The discussion below demonstrates the errors that led to this paradoxical understanding of the Crown.

4.3.1. The king's two bodies

³⁰ Maitland, above n. 1, at 247.

³¹ Ibid.

Tudor lawyers devised a theory of the king's two bodies. The theory postulated that the king had a body natural and a body politic. The body natural aged and died but the body politic – which comprised the king and all his heirs and successors – was eternal.³²

The theory drew from the canonical doctrine of *dignitas non moritur*.³³ Medieval scholars were inclined to draw analogies between kingship and theological doctrines to add gravitas to the practices of kingship with reference to canon law. The term *dignitas* originally referred to the concept that the Pope's authority would continue to legitimise papal appointments after the death of his mortal body.³⁴ The same concept of undying dignity was a useful way to describe the dynastic continuity of the king's reign. The successor's reign immediately following the predecessor's death so that the king's rule could continue without interregnum: "the king is dead; long live the king."³⁵ Kantorowicz describes how medieval funerary artwork and rituals juxtaposed the king's mortality with the continuity of his royal dignity after death.³⁶ These reinforced the message that the king might die as a person but would never die as king.

The common law first recognised the theory of the king's undying dignity in the 1556 case of *Hill v Grange*.³⁷ The case involved the question whether a statute enacted by Henry VIII also bound his successor, Edward VI, even though the statute only referred to the "king" and did not mention his "heirs and successors". The majority in the Court of Common Pleas held that a general reference to the "king" in a statute included all the king's heirs and successors, for:³⁸

³² Kantorowicz, above n. 14, at 3 and 378.

³³ At 316 – 320; Allison, above n. 13, at 47 – 53.

³⁴ Allison, above n. 13, at 49.

³⁵ Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 635.

³⁶ Kantorowicz, above n. 14, at 413 – 423.

³⁷ *Hill v Grange* (1556) *Commentaries or Reports of Edmund Plowden – Part 1* (S Brooke, London, 1816) 164.

³⁸ At 176.

the King is a body politic...and when an Act says, *the King*, or says, *we*, it is always spoken in the person of him as King, and in his dignity royal, and therefore it includes all those who enjoy his function.

Hill's introduction of the term "the king's body politic" to the common law laid the foundation for future confusion with the body politic of the Crown. *Hill* itself did not suggest that the king's body politic and the Crown were the same, as the body politic in *Hill* conveyed the king's *dignitas non moritur*, which was distinct from the Crown as a *universitas*.

However, the case of *The Duchy of Lancaster*³⁹ furthered the confusion. The issue was the legal validity of a lease that Edward VI had granted at a time he was under-age. The Court ruled that a king's grant could not be defeated by his non-age because the king was always of age when he acted in his body politic. The legal reasoning in this case expanded the meaning of the king's body politic to the point of encroaching upon the meaning of the Crown. *Plowden's Reports* notes:⁴⁰

The king has in him two bodies, viz. a body natural and a body politic. His body natural (if it be considered in itself) is a body mortal...But his body politic is a body that cannot be seen or handled, consisting of policy and government, and constituted for the direction of the people, and the management of the public weal...

The description of the king's body politic as "consisting of policy and government" veered dangerously close to usurping the Crown's function as the body politic of the nation. The king's body politic no longer only signified *dignitas*; it also bore traces of *universitas*.

³⁹ *Case of the Duchy of Lancaster* (1561) *Commentaries or Reports of Edmund Plowden – Part 1* (S Brooke, London, 1816) 212.

⁴⁰ At 212a.

The case of *Willion v Berkley* completed the process of synonymising of the Crown and the king's body politic.⁴¹ That case involved a claim of trespass. The defendant argued that he had a right to the plaintiff's land because one of his ancestors had paid a tax to the court of Henry VII on that land. Once again, the question arose whether Henry VII had collected the tax in his body natural or his body politic. The Court of Common Pleas held that the king had indeed collected the tax in his body politic, as a result of which the defendant had a right to the land. The Court discussed the king's two bodies in the following terms:⁴²

The king has two capacities, (a) for he has two bodies, the one whereof is a body natural, consisting of natural members as every other man has...; the other is a body politic, and the members thereof are his subjects, and he and his subjects together compose the corporation..., and he is incorporated with them, and they with him, and he is the head, and they are the members, and he has the sole government of them...

It is apparent that the Court misappropriated the organological analogy that described the Crown as the nation's body politic to describe the king's body politic instead. Until then, the Crown as the body politic had incorporated the king and the realm. The Court's language in *Willion* altered this understanding so that now the king himself could incorporate the realm in his body politic. The king's body politic became a *universitas* of king and realm and thus had the potential to replace the Crown.

4.3.2. The inseparability of the bodies politic and natural

The second factor that contributed to the fusion of the Crown and king was the theory that the king's body politic was inseparable from his body natural. This theory meant that the king's body politic could not be equated with the Crown in abstract; rather, the Crown had to be assimilated in the legal personality of the king as an individual.

⁴¹ *Willion v Berkley* (1559) *Commentaries or Reports of Edmund Plowden – Part 1* (S Brooke, London, 1816) 222a. Kantorowicz, above n. 14, at 11, notes that the case was argued a year before the *Duchy of Lancaster*, above n. 39, but the judgment was delivered after the judgment in *Duchy of Lancaster*.

⁴² At 233a.

The same cases that discussed the king's two bodies also established the inseparability of the body natural and the body politic. *Duchy* observed:⁴³

[The king] has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together and indivisible, and these two bodies are incorporated in one person, and make one body and not divers, that is the body corporate in the body natural, et e contra the body natural in the body corporate.

Willion echoed a similar sentiment that "the body natural and the body politic are not distinct, but united, and as one body."⁴⁴ *Wroth's case* in 1571 commented that the body politic "reposed" in the body natural; the two were severed only temporarily on the latter's death but only so that the former could be "conveyed over to, and repose[] in, another body natural."⁴⁵

The most influential discussion on the inseparability of the king's two bodies took place in *Calvin's case*.⁴⁶ *Calvin* centred on the issue whether a person was an "alien" in England if he was born in Scotland after the Union of the Crowns of Scotland and England in 1603. One argument was that a person could not owe allegiance to the kings of both Scotland and England even though the same man (James) ruled in both kingdoms because that the king had separate bodies politic for each of his realms. Sir Edward Coke, rejecting this argument, ruled that the diverse bodies politic were attached to the same body natural, so that allegiance to the body natural amounted to allegiance to both bodies politic. Coke's choice of words in describing the body politic is significant:⁴⁷

⁴³ *Duchy of Lancaster*, above n. 39, at 213.

⁴⁴ *Willion*, above n. 41, at 242 – 242a.

⁴⁵ *Wroth's case* (1571) 75 Eng. Rep. 678 at 685.

⁴⁶ *Calvin's case (Case of the Postnati)* (1608) 77 Eng. Rep. 377.

⁴⁷ At 389.

[Allegiance] was due to the natural person of the king (which is ever accompanied with the political capacity, and the political capacity as it were appropriated to the natural capacity), and it is not due to the political capacity only, that is, to his Crown or kingdom distinct from his natural capacity.

The most striking aspect of the above remark is that Coke equated the king's "political capacity" with "his Crown or kingdom". Coke elaborated on the likeness of the Crown and the king's body politic in the following terms:⁴⁸

[I]f you take that which is signified by the Crown, that is, to do justice and judgment, to maintain the peace of the land &c. to separate right from wrong, and the good from the ill: that is to be understood of that capacity of the king, that *in rei ceritate* hath capacity, and is adorned and endued with endowments as well of the soul as of the body, and thereby able to do justice and judgment according to right and equity, and to maintain the peace &c. and to find out and discern the truth, and not of the invisible and immortal capacity that hath no such endowments; for of itself it hath neither soul nor body.

...

And oftentimes in the reports of our book cases, and in Acts of Parliament also, the Crown or kingdom is taken for the king himself.

Coke conceived the king's body politic as having the same functions as the Crown, and therefore held that the Crown and the king's body politic were the same. His reference to "the reports of our book cases" suggests that he may not have been the first to equate Crown and king. However, he was certainly the most influential person until then to do so.

An unfortunate corollary of Coke's reasoning was that the king's body politic could not be equated to the Crown in abstract: the king as man and his body politic came in one parcel. In insisting that the two bodies were inseparable, Coke was seeking to avoid the "execrable and

⁴⁸ At 390 – 391.

detestable consequences”⁴⁹ of the king’s opponents using the body politic to attack the king’s person, as the barons had done during the reigns of Edward II and Richard II. However, Coke’s position also meant that the Crown – now the same as the king’s body politic – was part of the office of the king. This contradicted the medieval understanding that the Crown transcended the king. Whereas the Crown was once a composite entity of the king and the realm, now “the Crown or kingdom [was] taken for the king himself.”⁵⁰

4.3.3. Crown becomes the king as corporation sole

Four years after *Calvin*, Coke completed the evolution of the Crown into a corporation sole by redefining the office of the king as a corporation sole.⁵¹ In the case of *Sutton’s Hospital*, Coke said in an *obiter* comment:⁵²

As it is to be known that every corporation or incorporation, or body politic or incorporate, which are all one, either stands upon one (a) sole person, as the King, bishop, parson &c. or aggregate of many, as mayor, commonalty, dean and chapter, &c. and these are in the civil law called *universitas* sire *collegium*.

Coke had extracted the concept of the corporation sole from ecclesiastic law,⁵³ which treated the office of the parson as a corporation sole to enable the estate of the parson to pass to his successor in office without being devised. The application of the corporation sole analogy to the office of the king provided a legal explanation for successional continuity and removed the need to rely on the metaphysical concept of *dignitas*. Although Coke did not expressly call the “Crown” a corporation sole, the interchangeability of Crown and king meant that the Crown, too, was now a corporation sole denoting the office of the king.

⁴⁹ At 390.

⁵⁰ At 390.

⁵¹ Maitland, above n. 1, at 245, writes that he is not certain that Sir Edward Coke was the first to use the term “corporation sole” in relation to the king. However, Coke’s is certainly the most famous and authoritative usage of the term.

⁵² *Sutton’s hospital*, above n. 23, at 968.

⁵³ Maitland, above n. 1, at 245.

The account of the Crown's transformation into a corporation sole reveals the origin of the paradox within the concept of the Crown. The conflation of king and Crown was a conceptual error. It confused the separate concepts of *dignitas* and *universitas*. The former was an attribute of the king's body politic and represented the continuity of the king's office. The latter denoted the Crown as a body politic of the king and the government or the king and realm. Its composite nature was more similar to the incorporations that Coke described as "aggregate".⁵⁴ The conflation of king and Crown meant that the 17th century Crown could illogically refer to both, the Sovereign alone and the wider government or realm.

4.3.4. Incoherence overlooked

The foregoing shows that 17th century Crown was already an incoherent concept. Why did Coke and generations after him fail to comment on the Crown's internal inconsistency, and what does that suggest about the nature of the Crown?

The first reason is that "Crown" was often a "capricious"⁵⁵ term. Kantorowicz believes that the "innumerable aspects of that notion of Crown", which were applied "so thoughtlessly and easily to all sorts of capacities and competences", made it understandable that the judges, magnates or kings would fail to define the term clearly.⁵⁶ Indeed, Coke himself regarded the term "Crown" as an "hieroglyphic of the laws."⁵⁷ For Coke to have gone a step further than the judges before him and explicitly equate the Crown with the king's body politic would not have struck him or his contemporaries as a digression from the medieval conception of the Crown as a *universitas* of the king and government.

⁵⁴ *Sutton's hospital*, above n. 23, at 968.

⁵⁵ Allison, above n. 13, at 55.

⁵⁶ Kantorowicz, above n. 14, at 381.

⁵⁷ *Calvin's case*, above n. 46, at 390.

A second reason is the Crown had a quasi-religious character – a result of the lasting influence of theological doctrines in its development. Allison describes the Crown “as a symbol with a mystical quality evoking reverence rather than requiring reasoned elaboration.”⁵⁸ The Crown was scarcely a creation of law;⁵⁹ its roots were metaphysical and often a transplant from canonist doctrines.⁶⁰ Paradoxes were part of theology: for instance, Christ could be the son of man and the son of God; he could have a mortal body and a mystical body comprising the Church. Those among Coke’s contemporaries who perceived a paradox in the nature of the Crown – that it was a composite entity embracing the nation’s body politic but also a corporation sole comprising the office of the king – may have accepted the paradox as part of the Crown’s mystical quality.

The third reason, it is submitted, is that the paradox posed by the fusion of the Crown and the king held no legal ramifications for Coke and his contemporaries. As of the early 17th century, the king carried out the functions that the law ascribed to the Crown. The king held land and other property⁶¹ in the Crown’s name; he made gifts in perpetuity in the Crown’s name; he collected taxes in the Crown’s name; and so the list goes on. While the Crown may have denoted a concept wider than the king, the only person who could carry out the functions of the “Crown” was the king. Thus, it made little difference to Coke and his contemporaries that the law called the Crown something wider than the king and yet the corporation sole analogy equated the Crown with the king.

4.4. The Crown conceals a change

The analogy between the Crown and the monarch as a corporation sole became increasingly disconnected with reality in the 18th and 19th centuries once ministers began to perform the functions that the Sovereign earlier carried out in the Crown’s name. However, the Crown’s paradoxical ability to refer to both, the Sovereign and the wider government, provided a

⁵⁸ JWF Allison *A continental distinction in the common law* (Clarendon Press, Oxford, 1996) at 75.

⁵⁹ Kantorowicz, above n. 14, at 338.

⁶⁰ Allison, above n. 58, at 76.

⁶¹ *Fulwood’s case* (1591) 76 Eng. Rep. 1031 at 1032.

reassuring façade of continuity behind which this enormous constitutional change transpired. In particular, the Crown's metaphorical origins as a concept broader than the king made it a suitable term to refer to the emerging form of executive government that was broader from the king. Yet in law, the Crown remained synonymous with the king so that the law did not need to acknowledge that the political wielder of executive power was no longer the king. This section examines how the use of the Crown to denote the executive allowed the executive to evolve without its own legal personality, resulting in a State theory wherein the Sovereign represents the executive through a series of legal fictions.

4.4.1. When analogy reflected reality

The 18th century dawned on a political landscape where the monarch was still at the helm of the executive government. While the Glorious Revolution had handed Parliament the reins to the monarch's power, the monarch remained "the primary maker of policy".⁶² Bogdanor considers that it could still be justifiably said that "the sovereign governed the country".⁶³

Contemporary references to the "Crown" carrying out an executive function literally denoted the monarch performing that function. Blackstone described "the Crown" as appointing officers,⁶⁴ making a "private assurance" to the House of Commons,⁶⁵ paying pensions,⁶⁶ maintaining an army,⁶⁷ and being responsible for collecting and managing a vast revenue.⁶⁸ The king in fact carried out these functions of the executive.

⁶² Sebastian Payne "The royal prerogative" in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 77 at 100.

⁶³ Vernon Bogdanor *The monarchy and the constitution* (Oxford University Press, Oxford, 1995) at 9.

⁶⁴ William Blackstone and Edward Christian (ed) *Commentaries on the Laws of England* (12th ed, A. Strahan and W. Woodfall, London, 1793) at 326.

⁶⁵ At 323.

⁶⁶ At 326.

⁶⁷ At 336.

⁶⁸ At 335.

The only element of fiction in Blackstone's description would have been that the monarch obviously did not carry out these functions in person. He relied on his servants – foremost among them his ministers – to perform these tasks for him. Actions carried out by servants in the course of employment were actions of the master, and thus the law recognised no other actor apart from the king.

However, to attribute the minister's actions to the king through a master-servant analogy was not a linguistic stretch. Ministers "were not only in name... but in fact, the Queen's servants."⁶⁹ Their selection and appointment were entirely the monarch's prerogative in the early 18th century. Queen Anne hand-picked her ministers and paid their salaries out of her revenues.⁷⁰ The monarch's ministers advised the monarch on government but were under a duty to comply with the monarch's political decisions.⁷¹

It was therefore consistent with political reality to conceive the Crown as a corporation sole of the king alone, and to treat ministers as "servants" of the Crown who were distinct from the Crown itself. The synonymy of king and Crown was not a legal fiction.

4.4.2. The emergence of responsible government

The 150 years after Queen Anne's reign saw a significant shift of power from the monarch to a new form of government led by his ministers. Legally, the power remained with the monarch although politically, his cabinet of ministers exercised those powers. This shift occurred without a revolution, and thus there was little pressure on the law to recognise it explicitly. Instead of legal change, conventions emerged which required the monarch to act according to his ministers' advice, and ministers to exercise the prerogatives that the monarch enjoyed at law. A brief sketch

⁶⁹ Walter Bagehot and Paul Smith (ed) *The English constitution* (Cambridge University Press, Cambridge, 2001) at 9.

⁷⁰ Bogdanor, above n. 63, at 183.

⁷¹ At 11.

of the political change follows to show the new reality that the concept of the Crown was required to accommodate.

Political power began to shift from the monarch to his ministers following the ascent of George I in 1714.⁷² George's limited command over English prompted him to let his cabinet of ministers meet without him. Subsequent Sovereigns attended only a small number of cabinet meetings and after 1837 the monarch would never again sit in cabinet.⁷³

The king's ministers took over the exercise of the king's executive functions in all but name. As early as 1779, Lord Shelburne said in Parliament that the king "could not act but through the medium of his ministers in their several department."⁷⁴ By the time of Queen Victoria's reign, ministers exercised the queen's prerogatives in her name or else convention dictated that the queen would exercise the prerogative only upon the advice of her ministers.⁷⁵

The description of ministers as "servants" of the monarch became increasingly removed from reality. The king had the prerogative to appoint his ministers but during the 18th century it became a constitutional convention borne out of practical necessity for him to appoint those men who commanded the support of the majority in the House of Commons to have a better chance at negotiating for his favoured outcomes in Parliament.⁷⁶ Changes in the Civil List negotiations between 1782 and 1830 meant that Parliament incrementally took over the responsibility of paying the salaries of the ministers, judges and civil servants from the monarch.⁷⁷ The monarch no longer paid ministers from the Privy Purse. The scope for royal patronage

⁷² At 9.

⁷³ At 14.

⁷⁴ (1 December 1779) "Debate on the Earl of Shelburne's Motion" in TC Hansard *Parliamentary History – Volume 20* (Hansard, London, 1814) 1156 at 1167 (HL).

⁷⁵ Bogdanor, above n. 63, at 19.

⁷⁶ Elizabeth Wicks *The evolution of a constitution: eight key moments in British constitutional history* (Hart Publishing, Oxford, 2006) at 58.

⁷⁷ Adam Tomkins "Crown privileges" in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 171 at 178-179; Bogdanor, above n. 63, at 184.

diminished further with the evolution of organised political parties and the expansion of the electorate through the Reform Act 1832, as ministers kept or lost the confidence of the House along party lines.⁷⁸ Their political will was no longer the queen's will but the will of the majority in Parliament. This new model of government came to be known as "responsible government".

Further, ministers acquired powers outside the scope of the monarch's prerogatives. It became common practice since the 1830s for Parliament to empower ministers or specific departments through legislation to carry out specific executive functions.⁷⁹ The monarch had no claim on these novel forms of executive power.

The apparatus of executive government that emerged by the mid-19th century was fundamentally from early 18th century monarchical rule.⁸⁰ The executive – formerly an informal organisation of offices surrounding the king's council – had now evolved into a centralised multi-organ institution comprising departments, boards and commissions. A permanent civil service had replaced the earlier offices of public servants that one could buy from the king or obtain by patronage. There was also a drastic expansion in government activity. It is often said that before the late 18th century central government had little role in people's lives apart from being a "night-watchman" – that is, the enforcer of law and order.⁸¹ By contrast, legislation since the 1830s had increasingly imposed on the government responsibilities such as the setting of industrial standards, public works, or the provision of education.⁸²

4.4.3. The changing and constant Crown

The above changes in the nature and scope of executive power took place without any significant political upheaval or constitutional reform. The English experience was therefore markedly

⁷⁸ Bogdanor, above n. 63, at 17.

⁷⁹ FW Maitland *The Constitutional History of England* (Cambridge University Press, London, 1919) at 417.

⁸⁰ Janet McLean *Searching for the State in British legal thought* (Cambridge University Press, New York, 2012) Chapter 2; William Anson *The law and custom of the Constitution* (3rd ed, Clarendon Press, Oxford, 1907) at 217.

⁸¹ Carol Harlow and Richard Rawlings *Law and administration* (2nd ed, Butterworths, London, 1997) at 5.

⁸² McLean, above n. 80.

different from the French experience, where revolutionaries had deposed the monarchy before establishing a new framework for government. The continuity of the English monarchy was a point of difference and “national pride”:⁸³ it was proof of the adaptability of the English constitution.

English law found the term “Crown” a convenient emblem of continuity and change. In the first half of the 19th century, it was more common for legal and official documents to refer to the executive government as “the Sovereign” or as “His Majesty” or “Her Majesty”. The Crown became more widespread than these terms in the 1860s.⁸⁴

The reason for the more frequent use of “Crown” was its paradoxical ability to refer to both the Sovereign and a concept wider than the Sovereign. The fact that the Crown was a synonym for the Sovereign meant that the Sovereign still embodied government as a matter of law. Simultaneously, the Crown’s origins as a concept broader than the king made it a convenient way to refer to the new form of government. The shift in political power from the monarch to her ministers meant that “it made increasing sense to refer to [prerogative] powers as belonging to the ‘Crown’ (the ‘monarch acting in a public or constitutional capacity’), leaving the word ‘monarch’ to refer to the sovereign as an individual.”⁸⁵

However, the appearance of constitutional continuity came at the cost of conceptual clarity. Many statutes continued to define “the Crown” as the Sovereign even where the Crown denoted the wider executive. For instance, the Petitions of Right Act 1860 was enacted to enable aggrieved individuals to obtain a remedy from public money when their rights had been breached by unlawful government action. The Act even distinguished between judgments against the executive, which would be paid for out of money held by the Treasury or allocated by Parliament,

⁸³ Allison, above n. 13, at 175.

⁸⁴ McLean, above n. 80, at 140.

⁸⁵ Brigid Hadfield “Judicial review and the prerogative powers of the Crown” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 197 at 199.

and judgments against the Sovereign's household, which would be awarded against "any private property of...Her Majesty".⁸⁶ Yet s 7 of the Act provided that "[u]pon any such petition of right the suppliant shall be entitled to costs against Her Majesty...". "Her Majesty" in this section denoted the executive government rather than Her Majesty personally. Likewise, s 8 of the Pensions (Colonial Service) Act 1889 provided that "[t]he expressions 'permanent civil service of the State,' 'the permanent civil service of Her Majesty' and 'permanent civil service of the Crown [had] the same meaning."⁸⁷ Statutory language of this nature reinforced the position that the monarch was the legal personification of government and that the Crown had no distinct meaning.

Judicial language vacillated between accepting the "Crown" as an aggregate entity comprising officers and departments and collapsing the Crown into the Sovereign alone and relegating officers and departments to the status of "servants of the Crown". Blackburn J in *Mersey Docks and Harbour Board Trustees v Cameron* considered the term "servants of the Crown" to include "servants of the great departments of the State such as the Post Office... or the Admiralty", implying that the "Crown" included "the great departments of the State".⁸⁸ By contrast, Lord Cranworth in an 1861 House of Lords decision expressly called the Crown "a corporation sole, and having perpetual continuance".⁸⁹ Likewise, Wills J in *Gilbert v The Corporation of Trinity House* described "great officers of the state" as "servants of the Crown".⁹⁰ Relegating the officers and departments to the status of "servants of the Crown" allowed the law to continue to describe the government in terms of the monarch and her servants, as if there had been no change since Coke's times.

⁸⁶ Petitions of Right Act 1860, s 14; see Walter Clode *The law and practice of petition of right under the Petitions of Right Act, 1860* (William Clowes and Sons Limited, London, 1887) at 189.

⁸⁷ See also Martin Loughlin "The State, the Crown and the law" in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 33 at 37.

⁸⁸ *Mersey Docks and Harbour Board Trustees v Cameron* [1864-65] 11 Eng. Rep. 1405 at 1413, per Blackburn J.

⁸⁹ *Attorney-General v Kohler* (1861) 9 HLC 654 at 671, quoted by Noel Cox "The evolution of the New Zealand monarchy: the recognition of an autochthonous polity" (Doctoral thesis, University of Auckland, 2001) at 7, fn 12.

⁹⁰ *Gilbert v The Corporation of Trinity House* (1886) 17 QB 795 at 802, per Wills J.

4.5. Crown and the colony of New Zealand

The preceding narrative provides a useful backdrop to understand the foundation of the Crown in New Zealand and compare the historical understanding of the Crown in New Zealand and the United Kingdom. This section shows that New Zealand law recognised more clearly than English law the difference between the Crown qua government and the Crown qua Sovereign. However, New Zealand government could not acquire a distinct legal personality from the Sovereign because of its unincorporated status and the interchangeable use of the terms “Crown” and “Sovereign” in legal documents.

4.5.1. Different perspectives

The Crown was “one and indivisible throughout the Empire”⁹¹ at common law. *Calvin’s case* had established that the monarch’s body natural was the single repository of her bodies politic in respect of her various realms.⁹² Nineteenth century decisions affirmed that colonies did not have “several distinct bodies politic”.⁹³ Accordingly, there was no such thing as one Crown in respect of the United Kingdom and another Crown in respect of New Zealand. The Queen, being the embodiment of the Crown, singly embodied the government of the United Kingdom and of each colony.

However, conditions of government differed vastly between the United Kingdom and the Antipodean colonies, prompting New Zealand and Australia to perceive the Crown “as a concept of government quite distinct from the person of the Sovereign.”⁹⁴ One reason for this was that the monarch was an “absentee monarch”⁹⁵ in the colonies. In England, the Queen was a highly visible (albeit ceremonial) presence in the running of government and was therefore in the forefront of public imaginings of what “Crown” denoted. By contrast, New Zealand and Australian

⁹¹ *Theodore v Duncan* [1919] AC 696 (PC) at 706; see also Joseph, above n. 35, at 613.

⁹² *Calvin’s case*, above n. 46, at 389.

⁹³ *R v Bank of Nova Scotia* (1885) 11 SCR 1 at 20.

⁹⁴ Noel Cox “The theory of sovereignty and the importance of the Crown” (2002) 2(2) OUCJ 237 at 242.

⁹⁵ Cheryl Saunders “The concept of the Crown” [2015] 38 Melb. U. L. Rev. 873 at 883.

colonies were far removed from the pomp and historical institutions that reinforced the monarch's association with the Crown. A reigning monarch did not visit New Zealand until 1953.⁹⁶

Moreover, the term "Crown" was associated in New Zealand and Australia with a range of government activity, which was at odds with the dignified picture of the Crown as the monarch. Finn observes:⁹⁷

The raw conditions of the colonies, the patterns of settlement and investment, and the imperatives of development impelled governments into activities which were without counterpart in Britain or which in that country were conducted by local government, private enterprise or private and charitable organisations.

The Privy Council in *Farnell v Bowman* succinctly captured the different demands on colonial governments:⁹⁸

It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals and other works...

New Zealand was a case in point of the Crown acting as a "pioneer of improvement". By 1890, the Crown was the largest landowner and employer in New Zealand. It owned most railways and all telegraphs, controlled hospitals and asylums, maintained the system of charitable aid, managed the largest life insurance business, and provided education to nine-tenths of the children.⁹⁹ The Crown's role in providing these mundane necessities of colonial life made it a palpably down-to-earth entity that was far removed from the dignity of the monarch.

⁹⁶ Megan Cook "Royal family" (20 June 2012) *TeAra* <teara.govt.nz>.

⁹⁷ PD Finn "Claims against the government legislation" in PD Finn (ed) *Essays on law and government – Volume 2 – The citizen and the State in courts* (LBC Information Services, New South Wales, 1996) 25 at 30-31.

⁹⁸ *Farnell v Bowman* (1887) 12 App Cas 643 at 649.

⁹⁹ William Reeves *The Long White Cloud – Ao Teā Roa* (Viking, Victoria, 1987) at 282-283.

The government's wide-ranging activities also prompted colonial parliaments to distinguish the Crown qua government from the Crown qua Sovereign to prevent the latter's immunities in suit from attaching to the former. At common law, the Crown's indivisibility meant that the Crown enjoyed the same powers and immunities in the colonies that it did in the United Kingdom. "No distinction was drawn...between the rights and prerogatives of the Crown suing in respect of Imperial rights and the rights of the Crown with regard to the colonies."¹⁰⁰ Proceedings against the Crown could only be by petition of right and no remedy was available in tort. This was unacceptable to colonists: the Privy Council noted in *Farnell v Bowman* that the larger scale of government activity in the colonies meant that the Crown's immunity in tort could "work much greater hardship than ... in England".¹⁰¹

The Australian and New Zealand parliaments enacted a series of statutes starting from the 1850s which incrementally stripped the colonial governments of the Sovereign's immunities from suit and in tort.¹⁰² Colonial parliamentarians debating whether the Crown should be made liable in tort did not appear to have any qualm that such a finding would impute a wrong on the Sovereign; instead, they mostly described the "Crown" in terms that unambiguously denoted the government.¹⁰³ For example, future Premier of New Zealand Hon. John Hall, MP, put the question to the House, "Was it right, or was it not right, that the Government, in managing the railways, should be able to inflict injury on private individuals without the latter having any legal redress?"¹⁰⁴ A Supreme Court judgment awarded damages in tort against the Crown by finding

¹⁰⁰ *In Re Oriental Bank Corporation* 28 Ch. D 643, per Chitty J, quoted in *R v Bank of Nova Scotia* (1885) 11 SCR 1 at 20.

¹⁰¹ *Farnell*, above n. 98, at 649.

¹⁰² Claimants' Relief Act 1853 (SA); Claims against the Government Act 1857 (NSW); Claims against the Crown Act 1858 (Vic); Claims against Government Act 1866 (Qld); Crown Redress Act 1877 (NZ); Crown Suits Act 1881 (NZ); Crown Redress Act 1891 (Tas); Crown Suits (Amendment) Act 1910 (NZ); see PW Hogg "Victoria's Crown Proceedings Act" [1970] Melb. U. L. Rev. 342; A. E. Currie *Crown and Subject* (Legal Publications Ltd, Wellington, 1953) at 4-5.

¹⁰³ For further discussion, see Section 7.4.

¹⁰⁴ (28 October 1877) 26 NZPD 418.

the wrong to have been inflicted “by or under authority of the Executive Government”.¹⁰⁵ The language in these examples indicate a legal understanding that the Crown denoted, not the Sovereign, but the government as an entity in its own right.

4.5.2. Persistent ambivalence

Ultimately, however, the Crown in New Zealand failed to be an entity that was distinct from the Sovereign. There were two reasons for this. First, New Zealand’s legal documents used the terms “Crown” and “Sovereign” interchangeably when referring to the government. This prevented any coherent understanding that “Sovereign” referred to the Sovereign alone whereas “Crown” meant the government. Secondly, the government of New Zealand was not an incorporated entity, which forced it to act in the Sovereign or Crown’s name.

4.5.2.1. Interchangeability of Crown and Sovereign

Statutes often used “Queen” or “Her Majesty” instead of “Crown” even when referring to the Crown qua government. For example, an 1841 statute defined “Queen’s warehouse” as “any place provided by the Crown for lodging goods...”¹⁰⁶ The Land Claims Ordinance of 1842 provided:¹⁰⁷

All lands within the colony which have been validly sold by the aboriginal natives thereof are vested in Her Majesty, her heirs and successors, as part of the demesne lands of the Crown.

The Crown Suits Acts followed the formula of the Petitions of Right Act 1860 and retained references to proceedings against “His” or “Her Majesty” despite the underlying understanding that the entity being sued was the colonial government and not the Crown.¹⁰⁸ These interchangeable statutory references to the government as “Her Majesty” and “the Crown”

¹⁰⁵ *R v Williams* 1 NZLR (CA) 222 at 225, quoting the Crown Suits Act 1881, s 37.

¹⁰⁶ Customs Act 1841, s 55.

¹⁰⁷ Land Claims Ordinance 1842 5 Vict 14, cl 2.

¹⁰⁸ For example, see Crown Suits Act 1908, ss 23 and 24; Crown Suits Amendment Act 1910, ss 2 and 3.

reinforced the legal fiction that the government was embodied in the Sovereign, instead of recognising that the apparatus of government was distinct from the Sovereign.

Case law, too, occasionally reinforced the same legal fiction despite acknowledging the difference between the Sovereign and the government. In *Tasman Fruit Packing Association v The King*,¹⁰⁹ Alpers J was unhappy that the ancient prerogative of Crown priority in debt recovery still applied in modern circumstances when it applies to Government Departments.¹¹⁰ Yet His Honour left it to Parliament to remove the prerogative and said:¹¹¹

It does not stand with the honour and dignity of His Majesty the King that he should so frequently appear in his Courts, eo nomine, as a litigant in connection with these many Government Departments.

The interchangeable use of “Crown” and “Queen” or “King” when denoting the executive government made it impossible to separate the Crown qua executive from the Crown qua Sovereign. Salmond went as far as dismissing the Crown as a “figure of speech” because in law it was the Sovereign who carried out the actions attributed to the Crown. He wrote:¹¹²

In modern times it has become usual to speak of the Crown rather than of the King, when we refer to the King in his public capacity as a body politic. We speak of the property of the Crown, when we mean the property which the King holds in right of his crown. So we speak of the debts due to by the Crown, of legal proceedings by and against the Crown, and so on...Nevertheless we must bear in mind that this reference to the Crown is a mere figure of speech, and not the recognition by the law of any new kind of legal or fictitious person. The Crown is not itself a person in the law. The only legal person is the body corporate constituted by the series of persons by whom the crown is worn.

¹⁰⁹ *Tasman Fruit-Packing Association Ltd v The King* [1927] NZLR 518.

¹¹⁰ At 530.

¹¹¹ At 532.

¹¹² John W. Salmond *Jurisprudence* (4th ed, Stevens and Haynes, London, 1913) at 296.

Salmond's observations resonate with the fact that the Crown does not appear in New Zealand's founding documents. Instead, the founding documents are in the Sovereign's name. For instance, the Treaty of Waitangi is formulated as an agreement between "Her Majesty Victoria" and "the Chiefs and Tribes of New Zealand."¹¹³ The Charter of 1840 also names Her Majesty alone rather than the Crown.¹¹⁴ The Crown's absence in these documents made it easier to deny that the Crown had any legal foundation other than as a synonym for the Queen. This in turn prevented the Crown from being a distinct legal personality for the government of New Zealand.

4.5.2.2. "What is the thing called...the government?"¹¹⁵

The government of New Zealand depended on the Crown for its legal personality because of its unincorporated status. Early British colonial practice had been to incorporate the government of a colony to endow it with an independent legal personality. The royal charters for the early American colonies of Massachusetts, the Rhode Islands and Connecticut had constituted the governments of these colonies as corporations, so that they could act in their own name.¹¹⁶ However, these colonies had subsequently used their governments' incorporated status to declare independence from the King, prompting Great Britain to abandon the practice of incorporating colonial governments.¹¹⁷ Instead, English law fostered the notion of an "indivisible Crown" to thwart claims of political independence by new colonies.¹¹⁸ Colonial governments had no distinct legal personality and therefore had to act in the name of the Sovereign or the Crown.

Consistently with this later practice, New Zealand's founding legal instruments did not incorporate the government of New Zealand; instead, they constituted the individual offices and entities that comprised government and relegated "government" to the status of a legal

¹¹³ Treaty of Waitangi (6 February 1840), Preamble.

¹¹⁴ Constitutional Charter of New Zealand (16 November 1840).

¹¹⁵ *Sloman v Governor and Government of New Zealand* (1876) 1 CPD 563 at 565, per James LJ.

¹¹⁶ Salmond, above n. 112, at 297.

¹¹⁷ Maitland, above n. 1, at 262; McLean, above n. 24, at 55.

¹¹⁸ Joseph, above n. 35, at 613; see also J Hight and HD Bamford *The constitutional history and law of New Zealand* (Whitcombe and Tombs Limited, Christchurch, 1914) Ch 7.

colloquialism. For instance, the Charter of 1840 conferred powers and duties on the Governor of New Zealand,¹¹⁹ the Legislative Council,¹²⁰ and “officers and ministers”.¹²¹ The New Zealand Constitution Act 1852 described the powers of governance as vesting in “Her Majesty”, “the Governor-in-Chief” and “the Legislative Council thereof”.¹²² This practice avoided the need to recognise “the government” as a legal person which was capable of wielding legal powers or acting in its own name. The government had to act in the name of the Crown.

Sloman v Attorney-General illustrates the consequence of the colonial government’s unincorporated status.¹²³ In *Sloman*, a German shipping agent operating from Hamburg brought an action in the English courts against “the government of New Zealand” for its refusal to pay passage money for emigrants to New Zealand.¹²⁴

The question before the English Court of Appeal prior to the substantive hearing was whether *Sloman* had sued the proper defendant given that the New Zealand government had entered into the contract with *Sloman* under the name of the Queen of the United Kingdom. *Sloman* also sought an order for substituted service on the Governor of New Zealand in case the Court ruled that the government lacked legal personality to be sued.

The Court declined to allow the suit against either the government or the Governor of New Zealand. Mellis LJ suggested that the only remedy was by petition of right to the Queen, as the contract had been entered into “in the name of the Queen and by the Queen.”¹²⁵ James LJ said,

¹¹⁹ Charter of 1840, above n. 114, cl 4-7, 9-13

¹²⁰ At cl 3.

¹²¹ At cl 14.

¹²² New Zealand Constitution Act 1852, Preamble.

¹²³ *Sloman*, above n. 115.

¹²⁴ See Geoff McLay “The problem with suing Sovereigns” (2010) 41 VUWLR 403 at 424. It is unclear why *Sloman* did not bring a petition of right to the New Zealand courts under the Crown Redress Act 1871; the probable explanation is that the Crown Redress Act 1871 only applied to Crown obligations in contract arising within New Zealand, whereas the obligations in this case had arguably arisen in Hamburg.

¹²⁵ *Sloman*, above n. 115, at 567.

“There is here no body politic residing in England...called the Governor and government of the colony of New Zealand...”¹²⁶ His Honour also doubted that the case could succeed in New Zealand, as the plaintiff would have “the same difficulty in finding out who is to be served”. For, His Honour asked rhetorically, “What is the thing called the Governor and government of the colony of New Zealand?”¹²⁷ Baggallay JA criticised Sloman for “not know[ing] how to describe the parties he sought to sue.”¹²⁸

As a matter of law, the Court was correct that the government was not a legal person, as the government of New Zealand was unincorporated. However, the decision exposes the gap between law and reality. The notion that a party contracting with a colonial government would have to petition the Sovereign for a remedy was absurd. The separate funds at its disposal for discharging its legal liabilities meant that the colony’s government was a separate legal person for all practical purposes. Had Sloman successfully petitioned the Sovereign, he would have received payment from the public funds held by the government of New Zealand and not the government of the United Kingdom.¹²⁹ Indeed, the New Zealand government ultimately settled the claim with Sloman.¹³⁰ Yet the legal fiction that the Sovereign embodied the governments of all her colonies blinded the Court to this political reality.

4.6. The unfulfilled promise of the corporation aggregate analogy

The wide gap between the concept of the Crown and political reality remained unperceived until 1901 when Maitland criticised the Crown as the principal reason why English law lacked an adequate State theory.¹³¹ He proposed that the State should denote a corporation aggregate comprising monarch and government instead of the Sovereign as a corporation sole. However,

¹²⁶ At 565.

¹²⁷ Ibid.

¹²⁸ At 567-8.

¹²⁹ McLay, above n. 124, at 421.

¹³⁰ At 424.

¹³¹ Maitland, above n. 1. The article was originally published in 1901 as FW Maitland “The Crown as corporation” (1901) 17 LQR 131.

the law has been inconsistent in its uptake of the corporation aggregate analogy. Statutes like the Crown Proceedings Act 1947 (UK) and its New Zealand counterpart¹³² continue to define the Crown as the Sovereign. Concerns about the need to confine the Crown's immunities to the Sovereign have moreover led to a revival of the corporation sole analogy.¹³³ The result is that the Crown irrationally continues to treat the Sovereign as the government in the 21st century.

Maitland complained that English law did not recognise the State or government as a legal person.¹³⁴ He argued that the law projected the king as a supra-human institution or a corporation sole in order to perform the impossible feat of "get[ting] on without the State".¹³⁵ The slow substitution of the "Crown" for the "king" was a "subterfuge"; for, Maitland wrote, the Crown was "not among the persons known to...law" apart from being "another name for the King".¹³⁶ The end result was "a mess".¹³⁷ The law treated the Crown as the State whereas in reality it was no more than the Sovereign as a corporation sole.

Maitland's insights resonate with the preceding analysis in this chapter. The "subterfuge" to which Maitland refers is the 19th century development by which the Crown came to suggest the government apparatus (or "the State" in Maitland's language) whereas the law continued to define the Crown as the Sovereign. Maitland supported his argument that the Crown was not distinct from the Sovereign by pointing out that the Crown never sued or prosecuted or issued writs or letters patent by that name: "on the face of formal records the King or Queen [did] it all."¹³⁸ The truth of this remark is evident in New Zealand's founding documents, which were – as discussed above – in the Queen's name and did not mention the Crown.¹³⁹ The only point to add to Maitland's observation is that the Crown's capacity for the subterfuge arose from its

¹³² Crown Proceedings Act 1950, s 2.

¹³³ Wade, above n. 2.

¹³⁴ Maitland, above n. 1, at 245.

¹³⁵ At 253.

¹³⁶ At 257.

¹³⁷ At 259.

¹³⁸ At 257.

¹³⁹ See Section 4.5.2.2.

medieval origins as a *universitas* of the king and government;¹⁴⁰ this predisposed the Crown to a wider meaning than Coke's later conflation of Crown and king.

In Maitland's view, the apparatus of government was analogous to a corporation aggregate rather than a corporation sole. He wrote:¹⁴¹

The way out of this mess, for mess it is, lies in a perception of the fact, for fact it is, that our sovereign lord is not a "corporation sole" but is the head of a complex and highly organized "corporation aggregate of many" – of very many.

These words held the promise of a more rational State theory that expressly recognised that the Sovereign was not the government and that the government was a legal person in its own right.

However, Maitland's proposal did not have the intended effect because the law was inconsistent in its uptake of the corporation aggregate analogy. The idea that the Crown is a corporation aggregate initially received sparse judicial support. The House of Lords referred to the Crown as a corporation aggregate for the first time in *Adams v Naylor*¹⁴² and again in *Town Investments Ltd v Department of the Environment*.¹⁴³ In the latter decision, Lord Simon of Glaisdale described the Crown as "a corporation aggregate headed by the Queen", comprising "[t]he departments of state including the Ministers at their head..."¹⁴⁴ It was only after *Town Investments* that the corporation aggregate analogy became a regular part of common law discourse surrounding the Crown.¹⁴⁵

¹⁴⁰ See Sections 4.2.3 and 4.3.3.

¹⁴¹ Maitland, above n. 1, at 259.

¹⁴² *Adams v Naylor* [1946] AC 543 (HL) at 555, *per* Lord Uthwatt.

¹⁴³ *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813.

¹⁴⁴ At 833.

¹⁴⁵ See Loughlin, above n. 87, at 63.

New Zealand courts, too, have endorsed the corporation aggregate analogy.¹⁴⁶ In *Hall v Attorney-General*, Duffy J of the New Zealand High Court described the Crown as “a single entity with the various government departments that go to make it up comprising elements of this entity.”¹⁴⁷

Yet the corporation sole analogy remained firmly established in legal and academic perspectives. A decade after Maitland’s proposal, Salmond wrote in the fourth edition of *Jurisprudence* that the personality of the King had “rendered superfluous any attribution of fictitious personality to the State itself.”¹⁴⁸ He called the Crown as “a mere figure of speech”¹⁴⁹ that was only a synonym for the Sovereign as a corporation sole.

Current drafting practices for statutes continue to support Salmond’s observation. Cox writes:¹⁵⁰

New Zealand statutes have tended to use the terms “Her Majesty the Queen” and “the Crown” interchangeably and apparently arbitrarily. There appears to have been no intention to draw any theoretical or conceptual distinctions between the terms.

The most common definition of the Crown in New Zealand statutes is “Her Majesty the Queen in right of New Zealand”.¹⁵¹ The Crown Proceedings Act 1947 (UK) uses “His Majesty” and “Crown” interchangeably and states that “references to His Majesty include references to any Government department and to any officer of the Crown in his capacity as such.”¹⁵² Likewise, the New Zealand Crown Proceedings Act 1950 defines “Sovereign” or “the Crown” as “the Sovereign

¹⁴⁶ For example, see *Burrows v New Zealand Police* [2018] NZHC 2088 at [32]; *Hall v Attorney-General* [2012] NZHC 3615 at [121]; *Bain v Minister of Justice* [2013] NZHC 2123 at [116]-[117].

¹⁴⁷ *Hall*, above n. 146, at [121].

¹⁴⁸ Salmond, above n. 112, at 294.

¹⁴⁹ At 296.

¹⁵⁰ Cox, above n. 94, at 238.

¹⁵¹ For example, see Crown Forest Assets Act 1989, s 2(1); Finance Act (No 2) 1990, s 2; Māori Purposes Act 1993, s 3; National Provident Fund Restructuring Act 1990, s 2; New Zealand Public Health and Disability Act 2000, s 6(1); Post Office Bank Act 1987, s 2; Rural Banking and Finance Corporation of New Zealand Act 1989, s 2(1); State-Owned Enterprises Act 1986, s 2.

¹⁵² Crown Proceedings Act 1947 (UK), s 7(3).

in right of his or her Government in New Zealand.”¹⁵³ These definitions deny that government departments have a legal personality separate from the Sovereign.

The rules for naming the government as a party in legal proceedings also reinforce Salmond’s comment that the Crown is just a figure of speech. The term “Crown” is not used formally as the party name. The parties to a criminal proceeding where the “Crown” is the prosecutor are referred to in writing as “R” and the defendant, where “R” stands for Rex or Regina. Judicial review proceedings in the United Kingdom use the formulation “*R v respondent, ex parte applicant*”, signifying that Rex or Regina is bringing the proceeding against the respondent minister on behalf of the applicant.¹⁵⁴ This was also the case in New Zealand before 1972. However, the Judicature Amendment Act 1972 and now the Judicial Review Procedure Act 2016 require the applicant to bring the proceeding against the person whose action or omission is the subject of the application.¹⁵⁵ In civil proceedings, the persons or entities who may represent the Crown are the appropriate government department, the appropriate officer on behalf of the Crown or the government department, or the Attorney-General.¹⁵⁶ The practice of not naming the Crown as a party adds to the Crown’s aura of obscurity. It causes some to suggest that the Crown lacks legal personality¹⁵⁷ – a proposition which contradicts the understanding that the Crown is the legal embodiment of the State.¹⁵⁸

The upshot is that 21st century law has largely failed to adopt the analogy of the Crown as a corporation aggregate. Legal usage of the Crown continues to vacillate between denoting the Sovereign alone and referring to the government at large, as in the 19th century.

¹⁵³ Crown Proceedings Act 1950, s 2.

¹⁵⁴ *M v Home Office* [1994] 1 AC 377 at 416, *per* Lord Woolf.

¹⁵⁵ Judicature Amendment Act 1972, s 9(4); Judicial Review Procedure Act 2016, s 9(1).

¹⁵⁶ Crown Proceedings Act 1950, s 14.

¹⁵⁷ Law Commission *The Crown in court – a review of the Crown Proceedings Act and national security information in proceedings* (NZLC R135, 2015) at [2.7] and [2.10].

¹⁵⁸ Joseph, above n. 35, at 1182.

Some commentators do not see this as an issue; they consider that Crown may indeed be both a corporation sole and a corporation aggregate. In *M v Home Office*, Lord Woolf said that the Crown “could be appropriately described as a corporation sole or a corporation aggregate.”¹⁵⁹ McLean also appears to accept that the meaning of the Crown is contextual.¹⁶⁰ She observes that the Crown is conceived differently in different areas of the law; particularly, contract law conceptualises the officer acting on the Crown’s behalf as acting as the Crown, whereas administrative law treats the Crown as a disaggregated entity, where individual government decision-makers are the focus.¹⁶¹

It is submitted that the co-existence of the corporation sole and corporation analogies is detrimental to conceptual clarity and legal reasoning. A corporation sole and a corporation aggregate are conceptually disparate. The former indicates a corporation of an individual office-holder in time and the latter a corporation of many individuals. The difference traces back to the distinction between *dignitas* and *universitas* in medieval law. Lord Woolf clarified extra-judicially after his decision in *M* that the Crown could “hardly be both” a corporation aggregate and a corporation sole; he had simply meant that it was “difficult to say which description is the more appropriate.”¹⁶²

The lack of conceptual clarity results in confused legal reasoning to the detriment of individuals who bring proceedings against ministers and departments. For example, in *Bain v Minister of Justice*, the High Court had to decide whether the Minister of Justice had waived privilege over some legal advice that she had received by disclosing it to certain persons.¹⁶³ The Court found that it was the Crown, not the Minister, who had privilege over the legal advice because the

¹⁵⁹ *M v Home Office*, above n. 154, at 424.

¹⁶⁰ Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand* (Auckland University Press, Auckland, 2017) at 40 – 41.

¹⁶¹ McLean, above n. 18.

¹⁶² Lord Woolf, quoted in Loughlin, above n. 87, at 73.

¹⁶³ *Bain v Minister of Justice* [2013] NZHC 2123 at [26] and [86].

Minister was acting as the Crown when she obtained the advice.¹⁶⁴ However, the Court also found that the Minister's disclosure of the legal advice did not result in loss of privilege for the Crown because the Crown itself had to waive privilege;¹⁶⁵ a Minister's disclosure did not amount to waiver by the Crown. The Court's reasoning is internally inconsistent: it assumes that the Crown is a corporation aggregate for the purposes of obtaining legal advice so that legal advice to a minister amounts to legal advice to the Crown; however, the Crown is a corporation sole and distinct from its ministers when it comes to waiver of privilege because a minister cannot waive the Crown's privilege by disclosing the legal advice. To use a colloquialism, the Crown can "have its cake and eat it too." Chapter 8 contains many more examples of similar reasoning which demonstrates judicial vacillation between the corporation sole and corporation aggregate analogies.

The confusion created by the co-existence of the corporation sole and aggregate analogies is proof that Maitland's project has failed. Maitland wanted the corporate aggregate analogy to elucidate the Crown as a State theory – or, to use his words, to serve as "the way out of this mess".¹⁶⁶ Instead, the corporation aggregate analogy has become simply a further layer of contradictory meaning that attaches to the Crown.

4.7. Conclusion

Maitland's failure to reconceptualise the Crown holds a lesson for the present generation of lawyers: the Crown's paradoxical nature means that attempts to reconceptualise it are likely to wind up giving it a further layer of ambiguity. The paradoxical nature has been key to the Crown's longevity but is also an hindrance for clarity. The solution is therefore not to reconceptualise but to replace the Crown as a State theory.

¹⁶⁴ At [118] and [123].

¹⁶⁵ At [136]-[137].

¹⁶⁶ Maitland, above n. 1, at 259.

A replacement State theory must discard the corporation sole analogy to avoid retaining the paradox of the Crown. That is, it cannot use the Head of State (a person) to embody the State (a composite entity). Chapter 11 proposes a State theory where the State and Head of State are distinct legal entities. This will avoid the terminological uncertainty that shadows the use of “Crown” – namely, whether the Crown denotes the Sovereign or the apparatus of government. It will also internalise the corporation aggregate analogy by recognising that the State is a composite entity comprising many ministers, departments and other entities. Separating the State from the Head of State will align legal terminology with the modern political reality that the government is politically independent of the Sovereign.

Chapter 5: The three branches of government

5.1. Overview

Government comprises the legislature, judiciary and the executive branch. The Crown in theory represents all three branches of government but in practice mostly denotes the executive alone.

This chapter argues that the malleable usage of “Crown” conceals two shortcomings of the Crown as a State theory. First, individuals might not have any legal remedy when the legislature or judiciary breaches their right because the Crown can arguably only represent the executive branch at court.¹ Secondly, references to the Crown and Māori as “partners”² under the Treaty of Waitangi typically imply that the Crown denotes the executive branch alone; this undermines the constitutional understanding that each branch of government has a duty to respect the principles of the Treaty.³ The chapter submits that it is preferable to have a State theory that unambiguously describes the State as comprising all three branches of government instead of relying on the Crown to shape-shift into whichever role context demands.

5.2. Inconsistent usage

The Crown in theory denotes all three branches of government. Seddon describes the Crown as a “Holy Trinity, being the executive, judicial and legislative arms of government in one.”⁴ This conception derives from the Crown’s origin as a medieval metaphor for kingship at a time when the king wielded legislative, judicial and executive powers.⁵ Allison writes that the understanding of Crown evolved with the shifting political context:⁶

¹ See discussion in Section 5.3.3 below on the effect of *Attorney-General v Chapman* [2011] NZSC 110.

² For example, see *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 664 [“1987 New Zealand Māori Council case”]; *Paki v Attorney-General* [2014] NZSC 118 at [1].

³ See discussion in Section 5.4 below.

⁴ Nicholas Seddon “The Crown” (2000) 28 Fed. L. Rev. 245 at 245.

⁵ Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 643.

⁶ John Allison *The English historical constitution* (Cambridge University Press, Cambridge, 2009) at 58.

The monarchical form – the Crown – signified the King but, as the King in Parliament, or the King in his courts, accommodated the evolution of parliamentary sovereignty, as it did refinements to the rule of law.

The modern Crown continues to provide a theoretical unity to the three branches of government. The executive acts through the legal person of the Crown. Parliament comprises the Sovereign and the House of Representatives.⁷ The expression “Her Majesty’s courts” is a common way to refer to the courts in the United Kingdom.

There is some debate over whether the judiciary is part of the “Crown” in New Zealand.⁸ The expression “her Majesty’s courts” is not used in New Zealand. Shore and Kawharu note “a tendency to use the term ‘the Crown’ in a way that excludes the judiciary.”⁹ Further, the constitutional principle of judicial independence construes the judiciary as standing aloof from the “political” branches, namely, the executive and legislature.¹⁰ To this end, the Senior Courts Act 2016 and District Court Act 2016 contain provisions that protect judicial salaries and insulate the procedure for appointment and removal of judges from political interference. Shore and Kawharu report a senior legal academic’s comment that “generally under the doctrine of the separation of powers we would say that the judiciary really is separate from the Crown.”¹¹ The underlying assumption is that the judiciary is an impartial overseer of the Crown’s actions and therefore stands outside of it.

Others have challenged the view that the Crown excludes the judiciary.¹² One criticism is that the judiciary is “part of the state apparatus” and “clearly in other countries...[is] part of the state.”¹³ The fact that the Crown is New Zealand’s nearest equivalent of the “state” in other jurisdictions

⁷ Constitution Act 1986, s 14(1).

⁸ Cris Shore and Margaret Kawharu “The Crown in New Zealand” (2014) 11(1) *Sites: New Series* 17 at 29.

⁹ *Ibid.*

¹⁰ Joseph, above n. 5, at 797 and 815.

¹¹ Shore and Kawharu, above n. 8, at 29.

¹² *Ibid.*

¹³ *Ibid.*

makes it appropriate to include the judiciary within its ambit. It is also relevant that the New Zealand Bill of Rights 1990 applies to acts done by the legislative, executive or judicial branches of the government of New Zealand.¹⁴ Consistency with the Bill of Rights suggests that the Crown should embody all three branches of government.¹⁵ The link between the judiciary and the Crown is also apparent in other ways. The High Court derives its inherent jurisdiction from its origins in the king's courts.¹⁶ The judicial oath elicits a commitment from all judges to "truly serve Her Majesty, Her heirs and successors according to law..."¹⁷ As Loughlin notes, dispensing justice is ultimately one of the Crown's functions.¹⁸ The better view is therefore that the judiciary is part of the Crown.

The predominant usage of "Crown", however, denotes the executive alone. For example, the standard statutory provision "this Act binds the Crown"¹⁹ signifies the Crown qua executive as distinct from the legislature or judiciary. It is also common practice for courts to use the word "Crown" to refer to the prosecutor (such as the Police²⁰ or WorkSafe New Zealand²¹) or to government departments and agencies in civil proceedings.²² The Cabinet Manual uses the expression "the Crown's financial veto" to refer to the executive government's ability to veto proposals that would affect fiscal aggregates.²³

The usage of the Crown as executive stems from the Crown's historical affiliation with the Sovereign. The courts and Parliament divested the king of his judicial and legislative functions

¹⁴ New Zealand Bill of Rights Act 1990, s 3(a).

¹⁵ See discussion in Section 5.3. below.

¹⁶ Joseph, above n. 5, at 846.

¹⁷ Oaths and Declarations Act 1957, s 18.

¹⁸ Martin Loughlin "The State, the Crown and the law" in Maurice, Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 33 at 57-58.

¹⁹ For example, see Court Martial Act 2007, s 7; Senior Courts Act 2016, s 5; Veterans' Support Act 2014.

²⁰ For example, see *Douglas v Police* [2013] NZHC 174 at [18]; *Grace v Police* [2018] NZHC 2476 at [11].

²¹ *WorkSafe New Zealand v Tokyo Food Company Ltd* [2016] NZDC 6089.

²² For example, see *C & S Kelly Properties Ltd v Earthquake Commission* [2018] NZHC 157 at [16]; *Liu v Immigration New Zealand* [2014] NZHC 195 at [26].

²³ Cabinet Office *Cabinet Manual 2017* at 7.134-7.136.

much before the king delegated his executive functions to his ministers.²⁴ The Revolution Settlement of 1688 left the Sovereign with almost exclusively executive powers.²⁵ Consequently, the word “Crown” as a synonym for the king as a corporation sole has traditionally embodied the wielder of executive power as distinct from legislative or judicial powers.

The preceding discussion has contrasted the theory that the Crown embodies all of government with the ordinary use of “Crown” to denote the executive alone. The ensuing discussion examines the consequences of this inconsistency.

5.3. Public law damages against the Crown

The scope of damages in public law relates directly to the question of which branches of government the Crown encompasses. The Crown would be liable for breaches by any of the three branches if it represents the whole of government. By contrast, it would only be liable for the actions of the executive if it denotes the executive alone. This section considers three decisions where this was an issue: *Maharaj v Attorney-General for Trinidad and Tobago (No 2)*,²⁶ *Simpson v Attorney-General (Baigent’s Case)*²⁷ and *Attorney-General v Chapman*.²⁸ The first two decisions accepted that the Crown could be liable for public law damages for breaches by any of the three branches. However, the third decision, *Chapman*, ruled that the Crown is only liable for breaches by the executive. That remains the legal position in New Zealand. It is submitted that *Chapman* is incorrect because it creates a lacuna in the legal system whereby no accountability exists for breaches by the legislature or the judiciary.

5.3.1. *Maharaj v Attorney-General for Trinidad and Tobago (No 2)*

²⁴ Joseph, above n. 5, at 643.

²⁵ At 644; Bill of Rights 1689.

²⁶ *Maharaj v A-G for Trinidad and Tobago (No 2)* [1978] 2 All ER 670 (PC).

²⁷ *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667; 1 HRNZ 42 (CA).

²⁸ *Chapman*, above n. 1.

Maharaj was an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago. The facts concerned a decision by Scott J of the High Court of Trinidad and Tobago to commit the appellant for contempt of court without making clear to him the particulars of the specific nature of contempt. The appellant sought damages against the State of Trinidad and Tobago, relying on provisions in the Constitution of Trinidad and Tobago of 1962 that protected freedom from arbitrary detention and a right to a fair hearing. Section 6(1) of the Constitution allowed persons to apply to the High Court for redress for breach of their constitutional rights and freedoms. Before 1962, Trinidad and Tobago had been a British colony and recognised the Crown as Sovereign.

The majority in the Privy Council (Lord Hailsham dissenting) upheld the appeal and ruled that s 6(1) allowed damages to be awarded for breaches of constitutional rights by the judiciary. Their Lordships disagreed with the Attorney-General's argument that this would "subvert the long established rule of public policy that a judge cannot be made personally liable in court proceedings for anything done by him in the exercise or purported exercise of his judicial functions."²⁹ In their Lordships' view, the claim for redress was not against the individual Judge, nor based in vicarious liability for the Judge's actions. It was a claim directly against the State. Lord Diplock noted:³⁰

The claim for redress under s 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability: it is a liability of the state itself. It is not a liability in tort at all: it is a liability in the public law of the state, not of the judge himself, which has been newly created by s 6(1) and (2) of the Constitution.

The decision is significant in two respects. First, it recognises "judicial power" as a power of the State. This suggests that their Lordships may also have considered the Crown to embody judicial

²⁹ At 679.

³⁰ Ibid.

power and favoured the view that the Crown represented all three branches of government. Trinidad and Tobago had a written constitution that recognised the State but it does not appear that their Lordships regarded the “State” as a fundamentally different concept from the Crown: at several points in the judgment, their Lordships referred to “the Crown (now the State)”.³¹

Secondly, their Lordships treated the State as directly liable for breaches of constitutional rights by their officers. It did not matter that s 19 of the State Liability and Proceedings Act 1966 (the equivalent of s 2(5) of the Crown Proceedings Act 1947 (UK) and s 6(5) of the Crown Proceedings Act 1950 (NZ)) prevented a finding of liability against the Crown for actions or omissions by persons during the discharge of duties of a judicial nature. The Privy Council treated this provision as confined to vicarious State liability in tort.³² Their Lordships distinguished the case before them on the basis that the action was for a “public law” remedy which a person was entitled to invoke for breaches of constitutional rights.³³ In essence, their Lordships recognised a separate species of “public law” remedy that was not available at common law. *Maharaj* was to be significant to the New Zealand Court of Appeal’s analysis in *Baigent’s Case*.

5.3.2. *Simpson v Attorney-General (Baigent’s Case)*

Baigent is a landmark New Zealand Court of Appeal decision. The facts are well-known to most New Zealand lawyers. Briefly, the Police entered and searched the wrong property despite having been informed by several persons that the property did not match the address on the search warrant. The detective constable in charge allegedly told one of the witnesses that “We often get it wrong, but while we are here will have a look round anyway.”³⁴

The homeowner (and, after her passing, the executors of her estate) brought proceedings against the Crown in respect of the Police’s actions, naming the Attorney-General as first defendant. One

³¹ At 675 and 676.

³² At 679.

³³ Ibid.

³⁴ *Baigent*, above n. 27, at 53.

of the causes of action was breach of s 21 of the New Zealand Bill of Rights Act 1990. Section 21 protects the “right to be secure against unreasonable search or seizure”. At first instance, the High Court struck out the proceeding against the Attorney-General. The executors appealed the strike-out before the Court of Appeal.

One of the main issues for the Court of Appeal as part of determining the validity of the strike-out was whether monetary compensation was available for infringement of rights affirmed by the Bill of Rights Act.³⁵ The Attorney-General argued that no compensation was available because first, s 6(5) of the Crown Proceedings Act 1950 immunised the Crown from liability for actions or omissions by persons during the discharge of duties of a judicial nature. The execution of a search warrant fell within this category of functions.³⁶ Secondly, the Bill of Rights Act had no provision enabling courts to award remedies for breaches of the Act.³⁷

The majority of the Court of Appeal (Gault J dissenting) held that monetary compensation was available for breach of the Bill of Rights Act.³⁸ Their Honours adopted the Privy Council’s ruling in *Maharaj* and found that s 6(5) of the Crown Proceedings Act did not prevent a finding of direct Crown liability for a breach of a right affirmed by the Bill of Rights Act.³⁹ This was distinct from vicarious liability in tort. Accordingly, their Honours found that there was a valid cause of action against the Crown and ordered the reinstatement of the proceedings against the Attorney-General.⁴⁰

One particularly relevant aspect of *Baigent* is their Honours’ acceptance (albeit *obiter*) that the Crown embodied all three branches of government and was liable for breaches of the Bill of Rights Act of any of the three branches. McKay J called the Crown “the legal embodiment of the

³⁵ At 56-57.

³⁶ At 71.

³⁷ At 57.

³⁸ At 59, *per* Cooke P; 73, *per* Casey J; 81 and 86, *per* Hardie Boys J; 103, *per* McKay J.

³⁹ At 58, *per* Cooke P; 75, *per* Casey J; 80- 81, *per* Hardie Boys J; 104, *per* McKay J.

⁴⁰ At 60, *per* Cooke P; 75, *per* Casey J; 87, *per* Hardie Boys J; 104, *per* McKay J.

State” and observed that the Act applies “to acts by the legislative, executive or judicial branches of the Government”.⁴¹ His Honour concluded that “[w]here a right is infringed by a branch of the Government or a public functionary, the remedy must be against the Crown.”⁴² Hardie Boys J made a similar comment:⁴³

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms.

McKay and Hardie Boys JJ’s views are consistent with section 3(a) of the Bill of Rights Act, which provides that the Act applies “to acts done...by the legislative, executive, or judicial branches of the Government of New Zealand.” It stands to reason that remedies should be available against breaches by all three branches when Parliament patently intended the Act to apply to the acts of all three branches. It is the Crown which has to bear liability for all three branches In the absence of an alternative collective legal personality for government.

5.3.3. *Attorney-General v Chapman*

Chapman is a controversial decision of the Supreme Court of New Zealand.⁴⁴ It overturns the *obiter* comments of McKay and Hardie Boys JJ in *Baigent* and holds that the Crown is only liable for breaches of the Bill of Rights Act by the executive branch. It is submitted that the decision reflects the problem with the lack of clarity over whether the Crown represents all three branches of government or just the executive branch.

The facts of *Chapman* are as follow:⁴⁵ Mr Chapman was convicted and imprisoned for sexual offences against a young boy. He appealed against the conviction. He was denied legal aid and

⁴¹ At 104, *per* McKay J.

⁴² *Ibid*.

⁴³ At 86, *per* Hardie Boys J.

⁴⁴ See Philip Joseph “Constitutional law” [2012] NZLRev. 516 at 519 to 527.

⁴⁵ *Attorney-General v Chapman* [2010] 2 NZLR 317 (CA), at [1]-[5] [“Court of Appeal judgment”].

the appeal was dismissed in accordance with the *ex parte* appeal process that operated at the time. A subsequent ruling of the Privy Council in another decision⁴⁶ found that the manner of dealing with legal aid applications and the *ex parte* appeal process which existed at the time of Mr Chapman's appeal were unlawful and breached the New Zealand Bill of Rights Act 1990. Subsequently, Mr Chapman re-appealed his conviction and was granted a retrial. Before the retrial could proceed, Mr Chapman applied for a discharge under s 347 of the Crimes Act 1961. The Crown eventually withdrew its opposition to the discharge application because key evidence had been lost and the complainant did not want to give evidence again. The District Court discharged Mr Chapman.

Mr Chapman then sued the Attorney-General for the Crown for breach of his rights to a fair trial and natural justice under ss 25 and 27 of the Bill of Rights Act. Preliminary questions of law arose that resulted in the case being transferred to the Court of Appeal at first instance.

One of the issues before the Court of Appeal was whether there was jurisdiction to order public law compensation against the Crown for a breach of the Bill of Rights Act by the judicial branch.⁴⁷ Glazebrook J, delivering the unanimous judgment of the Court, held that there was. Her Honour relied on the majority judgment in *Baigent* in support of this view.⁴⁸ Specifically, her Honour accepted that excluding the judiciary from the scope of the compensation remedy under the Bill of Rights Act would "involve excluding, in part, the judicial branch from the overall operation and 'application' of the Bill of Rights, contrary to s 3, which states that the Bill of Rights applies (without qualification) to the three branches of government under s 3(a)."⁴⁹ This observation strongly suggests that the Court of Appeal construed the Crown as embodying all three branches of government.

⁴⁶ *R v Taito* [2001] UKPC 50, [2001] UKPC 59, [2003] 3 NZLR 577.

⁴⁷ Court of Appeal judgment, above n. 45, at [7].

⁴⁸ At [68].

⁴⁹ At [78].

The Attorney-General appealed against the finding that the Crown was liable for judicial breaches of the Bill of Rights Act. One of the submissions for the Attorney-General on appeal was that the Crown denotes the executive alone. A paraphrased version of the submission appears in Elias CJ's judgment:⁵⁰

New Zealand domestic law knows no such concept as "the State"...[R]eferences in the Bill of Rights Act and in the Crown Proceedings Act to "the Crown" are properly to be understood as references to the executive branch and...there is no procedure by which "the State" can be called to account in New Zealand courts.

The submission highlights the problem of the ambiguity of the Crown's meaning and its adverse consequences for government liability. It is open for the government's chief law officer to suggest that the State cannot be called into account in New Zealand courts – a proposition that sounds heretical by any interpretation of the rule of law and by the standards of most liberal-democratic legal systems.

The Supreme Court upheld the Attorney-General's appeal by a majority of 3:2. None of their Honours accepted the Attorney-General's submission that there was no concept of State in New Zealand,⁵¹ although the majority's decision leaves this point open to interpretation. The ensuing paragraphs examine their Honours' judgments in detail.

The majority comprised McGrath, William Young and Gault JJ. It is McGrath and William Young JJ's common judgment that demands closer attention; Gault J issued a cursory five-paragraph judgment in which he concurred with their Honours and reiterated his dissenting position in *Baigent*.

⁵⁰ *Chapman*, above n. 1, at [14].

⁵¹ At [205], *per* McGrath and William Young JJ; Elias CJ at [14].

McGrath and William Young JJ held that the Crown was not liable for breaches of the Bill of Rights Act by the judicial branch.⁵² Their Honours read down the majority ruling in *Baigent* to hold that Crown liability was limited to breaches by the executive.⁵³ They justified this narrow interpretation of *Baigent* by noting that *Baigent* only involved breaches of rights by the Police and that “the general language” used in *Baigent* should “not be taken to have wider application than to breaches by the executive branch.”⁵⁴ Further, their Honours were not convinced that it was “implicit in the Bill of Rights Act that the Crown is guarantor of all breaches of rights by those bound under s 3(a).”⁵⁵

Does this mean that McGrath and William Young JJ believed that the Crown did not embrace all three branches of government? This remains unclear. Their Honours recorded that they were “not persuaded by the Solicitor-General’s [sic] argument that there is no concept of the state in New Zealand domestic law.”⁵⁶ However, they maintained that they were “satisfied” that it was “unnecessary” to extend *Baigent* damages to judicial breaches.⁵⁷ The driving consideration behind this position was based in policy:⁵⁸ their Honours feared that holding the Crown liable for judicial breaches would threaten the principle of judicial immunity and undermine judicial independence.⁵⁹ Ultimately, McGrath and William Young JJ’s judgment does not confirm whether the judiciary is part of the Crown or, if it is, why the Crown cannot be liable for judicial breaches of the Bill of Rights Act except for reasons of policy.

⁵² At [97].

⁵³ At [128]-[145].

⁵⁴ At [127]-[128].

⁵⁵ At [128]-[129].

⁵⁶ At [205].

⁵⁷ At [205].

⁵⁸ At [97]; see also Joseph, above n. 44, at 522; for more general policy concerns about Crown liability for breaches of the New Zealand Bill of Rights Act, see Law Commission *Crown liability and judicial immunity: a response to Baigent’s case and Harvey v Derrick* (NZLC R37, 1997).

⁵⁹ At [185]-[192].

Elias CJ and Anderson J dissented, the latter concurring with the former. The Chief Justice had no doubt that “the State” must be directly liable for judicial breaches of the Bill of Rights Act.⁶⁰ Direct State liability for judicial breaches was distinct from tortious liability and did not conflict with judges’ personal immunity from tortious liability or the Crown’s immunity from vicarious liability for acts or omissions of a judicial nature.⁶¹ Excluding State liability for judicial breaches “would be contrary to the scheme and purpose” of the Bill of Rights Act. It would create “a large remedial hole”,⁶² given that “all three branches, including the judicial branch, are bound to observe and protect the rights affirmed”⁶³ under the Act.

The Chief Justice used the term “State” instead of “the Crown” throughout her judgment. This was deliberate:⁶⁴ her Honour specifically wished to counter the Attorney-General’s submission that New Zealand law did not have a concept of the State and therefore no remedies were available in respect of the judiciary’s breaches. In her Honour’s view, this position was “contrary to the rule of law”.⁶⁵ The Crown could mean both, “the executive” and “the government of New Zealand” or “the State”.⁶⁶ The correct meaning depended on the context. “Crown” in the context of the Bill of Rights Act extended to all three branches of government by virtue of s 3(a) of the Act. Her Honour used the word “State” instead of “the Crown” to make this clear.⁶⁷

It should be noted that the Chief Justice did not suggest that “the State” and “the Crown” are different concepts. Rather, she considered them synonyms. However, her Honour treated “State” as having the wider and less equivocal meaning of the two terms. This suggests that the term “State” may have an advantage over “Crown” in defining the government more clearly. Chapter 11 examines this proposition and concludes that it is correct.

⁶⁰ At [8], *per* Elias CJ.

⁶¹ At [29].

⁶² At [8].

⁶³ At [8].

⁶⁴ At [14].

⁶⁵ At [14].

⁶⁶ At [14].

⁶⁷ At [14].

It suffices for the present chapter to highlight the undesirable consequences of the Crown's contextual ambiguity. The majority's position in *Chapman* is laden with policy but light on legal principles. The uncertainty regarding the Crown's ambit is largely responsible for this. It gave the majority leeway to exclude the judiciary from the scope of public law damages without providing a principled explanation as to how the legal embodiment of the government could be liable for breaches by only one of its branches but not the other branches. The majority's reasoning fails to quell the Attorney-General's submission that the Crown denotes the executive alone and that there is no legal entity in New Zealand that collectively embodies all three branches of government.

A cogent State theory that clearly defines the State as embodying all three branches of government might well have changed the outcome in *Chapman*. At the very least it would have prompted the majority to reconsider whether it was able to exempt the State for liability for judicial breaches when the judiciary was clearly a part of the State. One imagines that the Court would have left it to Parliament to enact legislation that specifically addressed any policy concerns surrounding State liability for judicial breaches. A statute that immunises the State in respect of judicial breaches would be seen as a policy-based exception to the State's coverage of government liability; it would not create fundamental constitutional uncertainty surrounding whether the definition of "State" includes the judiciary at all, as the majority decision in *Chapman* has done.

5.4. Crown's duties under the Treaty of Waitangi

New Zealand law construes "the Crown" and Māori as "partners" under the Treaty of Waitangi.⁶⁸ A gripping question is whether "Crown" in the context of the Treaty denotes the executive branch or the whole of government.

⁶⁸ For example, see the 1987 New Zealand Māori Council case, above n. 2, at 664; *Paki*, above n. 2, at [1].

The “Crown” in case law concerning the Treaty typically denotes the executive. This is apparent from the judicial focus on the Crown’s statutory obligations. For instance, the Court of Appeal in *New Zealand Māori Council v Attorney-General*⁶⁹ held that the Crown had an obligation to exercise its powers and discharge its duties under the State-Owned Enterprises Act 1986 with the utmost good faith.⁷⁰ Courts would not describe the Crown as having such obligations if “Crown” also included Parliament. Confining the meaning of “Crown” to the executive in Treaty cases reinforces the traditionalistic position that the Treaty cannot fetter Parliament’s lawmaking power.

On the other hand, the conventions of lawmaking and statutory interpretation support the understanding that the Crown’s duties as a Treaty partner extend to all three branches of government. It is a legislative convention that every new legislative proposal will be checked for consistency with the principles of the Treaty.⁷¹ There is also a presumption of statutory interpretation that courts “will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty” where the legislation is ambiguous or refers expressly to the Treaty.⁷² These conventions recognise the Treaty’s constitutional significance without overriding the principle of legislative supremacy.

There is also some historic support for the interpretation that “Crown” means the whole of government in the context of the Treaty. McLean writes that “in the early colonial period, the Crown was the channel for a form of royal absolutism” and “not yet...separated into its different branches.”⁷³ This suggests that the Crown which treated with Māori in 1840 was not just the

⁶⁹ 1987 New Zealand Māori Council case, above n. 2.

⁷⁰ At 664 and 683.

⁷¹ Joseph, above n. 5, at 82.

⁷² 1987 New Zealand Māori Council case, above n. 2, at 656, *per* Cooke P.

⁷³ Janet McLean “Crown, Empire and redressing historical wrongs of colonisation in New Zealand” [2015] NZLRev. 187 at 210.

Crown qua executive but the Crown embodying all three branches of government. McLean notes that the Waitangi Tribunal's decisions occasionally reflect this understanding:⁷⁴

When the Waitangi Tribunal assesses whether the Crown has met its obligations in the Treaty it similarly refers to an Imperial Crown who represents both the legislative and executive branches...

It is submitted that the Treaty's constitutional significance supports the interpretation that the Treaty imposes duties on all three branches – albeit these duties are balanced by competing constitutional principles of legislative supremacy. The Crown's ambiguity has stunted this interpretation from becoming more prevalent; it perpetuates the traditionalistic position that the Treaty only has legal effect to the extent incorporated in statutory law.⁷⁵

5.5. Conclusion

Context dictates whether the Crown denotes the executive alone or all three branches. This is unsatisfactory: it creates uncertainty and opens an avenue for the government to disclaim responsibility for the actions of the legislative and judicial branches.

It is preferable to have a State theory that defines the State as comprising all three branches. This would restore the *Baigent* understanding of the State as guarantor of the constitutional rights and freedoms under the New Zealand Bill of Rights Act. It would also be a more appropriate reflection of the Treaty's constitutional significance because the State's duties as a Treaty partner would extend to all three branches of government.

⁷⁴ At 210.

⁷⁵ *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC).

Chapter 6: The executive and the public sector

6.1. Overview

The ambit of the Crown is uncertain. It does not coincide with the ambit of either the executive branch or the wider public sector. This raises the question what exactly the Crown demarcates and on what basis.

This chapter first explores the contradictory demarcations of the Crown in statutes and common law. It shows that the common law tests of control, prejudice and function have fundamentally different approaches to ascertaining whether an entity is the Crown; these approaches do not have any correlation with the ambit of the executive branch or the public sector. Further, the public sphere is littered with entities who are labelled “servants”, “agents”, “officers”, “instruments”, “emanations” or even “creatures” of the Crown. The multiplicity of terms contributes to the incoherence about the Crown’s ambit.

Next, the chapter analyses on what basis the law demarcates the Crown if not to delineate either the executive or the public sector. The analysis establishes that the Crown’s boundaries are driven more by policy than principle. They evolved as a result of courts attempting to circumscribe the spread of the Crown’s immunities.

The chapter finds that the Crown’s boundaries would become largely irrelevant if immunities were to attach to specific entities as opposed to the ill-defined concept of the Crown. However, this would not be sufficient to rid the law of the uncertainty of the Crown’s boundaries. Several statutes confer distinct rules on the Crown which necessitates enquiries into what the Crown denotes. Courts also determine the Crown’s boundaries to decide whether the central government is liable for an entity’s action, and whether land that is subject to a claim by Māori is in the Crown’s control. New Zealand law has to devise alternative ways to analyse these issues without reference to the Crown’s ambit to achieve a coherent legal understanding of the executive branch and public sector.

6.2. Statutory definitions of the Crown

It is not possible to obtain a generic understanding of the ambit of the Crown from statutes due to variations between statutory definitions. The most common definition of the Crown is “Her Majesty the Queen in right of New Zealand”.¹ This simply reinforces the corporation sole analogy; it does not indicate what the Crown’s boundaries are. Other statutes set inconsistent boundaries for the Crown. For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018 provides that “Crown” means “ministers of the Crown and all departments”, “all offices of Parliament”, “all statutory entities” and “the Reserve Bank of New Zealand.”² This definition leaves out the Sovereign or her representative, the Governor-General. By contrast, the Public Finance Act 1989 provides that the Crown comprises the Sovereign and “all Ministers” and “all departments” but expressly omits offices of Parliament and Crown entities, which include statutory entities.³ These examples show that the Crown’s ambit is entirely contextual to the statute.

A further source of confusion about the Crown’s ambit is the non-indicative use of the term “Crown” in the Crown Entities Act 2004. The Crown Entities Act sets out the various categories of public entities and provides for their different frameworks of governance.⁴ Section 7(1) of the Act defines “Crown entity” as comprising statutory entities, Crown entity companies, Crown entity subsidiaries, school board of trustees and tertiary education institutions.⁵ This would suggest that these categories of entities are part of the Crown. Not so: some statutes include

¹ Crown Forest Assets Act 1989 s 2(1); Finance Act (No 2) 1990, s 2; Māori Purposes Act 1993, s 3; National Provident Fund Restructuring Act 1990, s 2; New Zealand Public Health and Disability act 2000, s 6(1); Post Office Bank Act 1987, s 2; Rural Banking and Finance Corporation of New Zealand Act 1989, s 2(1); State-Owned Enterprises Act 1986, s 2.

² Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018, s 41.

³ Public Finance Act 1989, s 2.

⁴ Crown Entities Act 2004, s 3.

⁵ *Ibid.*, s 7(1).

Crown entities within their definition of the Crown⁶ whereas others exclude them.⁷ Further, as discussed below, the application of the common law “control” test to these entities results in only some statutory entities falling within “the umbrella of the Crown.”⁸ The fact that there are Crown entities that are not part of the Crown creates a misleading understanding of the ambit of the Crown.

The statutory definitions of the Crown do not consistently align with the understanding of either the executive branch or the wider public sector. Chapter 3 noted that while the demarcation between the executive and public sector is uncertain, the executive at the very least comprises the Sovereign, the Governor-General, the Prime Minister, ministers, Cabinet, the Executive Council and government departments. The definition of “Crown” in the Comprehensive and Progressive Agreement Act for Trans-Pacific Partnership Amendment Act 2018 excludes the Sovereign (who is part of the executive) and includes the Reserve Bank (which most would agree lies outside the executive branch and is part of the wider public sector).⁹ The Prisoners’ and Victims’ Claims Act 2005 includes “a contractor or security contractor” within its definition of the Crown, which indicates that the Crown can also include private entities.¹⁰

New Zealand statutes tend to use the term “State” more consistently than “Crown”. The possibility of using the term State as a coherent embodiment of the entire public sector is explored at length in Chapter 11. It warrants a brief comment at this juncture.

There is no statutory definition of the State; however, the statutory pattern of using the term “State” suggests that it embraces the wider public sector. The State Sector Act 1989 establishes

⁶ For example, see Search and Surveillance Act 2012, s 167(2).

⁷ For example, see Public Finance Act 1989, s 2; Copyright Act 1994, s 2.

⁸ Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 620; see also Section 6.3.3.1.

⁹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018, s 41.

¹⁰ Prisoners’ and Victims’ Claims Act 2005, s 6(2).

a “State sector system”.¹¹ While the statute itself does not define “State sector”, a list of all the organisations in the State sector is publicly available from the State Services Commission’s official website.¹² The list includes all government departments, all Crown entities, Public Finance Act Schedule 4 organisations and Schedule 4A companies, the Reserve Bank, offices of Parliament, State-Owned Enterprises (SOEs) and Mixed-Ownership Model companies.

Other statutes that predominantly use the term “State” instead of the Crown are the State-Owned Enterprises Act 1986 and the Education Act 1989. These statutes engrain the use of “State” in connection with government-provided services. For example, SOEs comprise service-providers such as KiwiRail and the New Zealand Post.¹³ The Education Act establishes the terms “State system of education” and “State schools”.¹⁴ These uses of the word “State” are consistent with the understanding that the State embraces the wider public sector.

The language of the State therefore has more potential as a coherent personality for the public sector than the term “Crown”. The potential cannot be realised at present because the Crown embodies government and the State remains an informal concept with no statutory definition. Further, the terms “Crown” and “State” overlap haphazardly in statute. The definition of “State services” includes “instruments of the Crown” and Crown entities.¹⁵ Chapter 11 submits that New Zealand statutes will need to discard the term “Crown” and define the State more clearly before the State can serve as a coherent legal personality for the entire public sector.

6.3. Judicial enquiries into the Crown’s ambit

¹¹ State Sector Act 1989, ss 1A and 6.

¹² State Services Commission “New Zealand’s State sector – the organisations” (1 February 2018) <<https://www.ssc.govt.nz>>.

¹³ State-Owned Enterprises Act 1986, Schedule 1.

¹⁴ Education Act 1989, ss 2 and 417.

¹⁵ State Sector Act 1989, s 2.

The Court of Appeal has described the Crown as a “closely related concept”¹⁶ to the executive. However, the common law has drawn boundaries for the Crown that do not correspond with the boundaries of either the executive branch or the wider public sector. The ensuing discussion examines the various approaches used in judicial enquiries to determine if an entity is within the ambit of the Crown. It points out the inconsistencies between these approaches and the resulting confusion over the ambit of the Crown.

6.3.1. “Control” test

The “control” test is predominant in New Zealand: courts will accord Crown status to an entity that is subject to a close degree of ministerial or central government control. The relevant factor is the degree of legal control and not the control actually exercised.¹⁷ In *Commissioner of Inland Revenue v Medical Council of New Zealand*, the Court of Appeal described the control test as follows:¹⁸

[I]s the nature and degree of the control which Ministers and other central government agencies exercise over the body such that the body is an agent of the Crown?

To illustrate the control test in operation: the Accident Compensation Corporation (ACC) is sufficiently within ministerial control for ACC property to be deemed “lands ‘in the hands of the Crown’”.¹⁹ The New Zealand Railway Corporation is also “to be regarded as the Crown”²⁰ and is entitled to the Crown’s immunity from prosecution under the Marine Pollution Act 1974. By contrast, the Crown “does not have a sufficient degree of control” over the Medical Council of New Zealand and the Medical Council is therefore not exempt from taxation under s 61(2) of the Income Tax Act 1976.²¹

¹⁶ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 326.

¹⁷ Joseph, above n. 8, at 618; *Accident Compensation Corporation v Stafford* [2018] NZHC 218 at [84], per Collins J.

¹⁸ *Medical Council of New Zealand*, above n. 16, at 327.

¹⁹ *Stafford*, above n. 17, at [49] and [86].

²⁰ *Miller v New Zealand Railways Corp* [2011] NZAR 21 at 24.

²¹ *Medical Council of New Zealand*, above n. 16, at 331.

Some cases assume that the Crown as delineated by the control test is synonymous with the executive branch. In *Medical Council of New Zealand*, the Court of Appeal applied the control test to determine whether the Medical Council was an “instrument of the Executive Government” under s 61(2) of the Income Tax Act. The Court prefaced its analysis by referring to “executive government” and “the Crown (in its executive capacity)” as “closely related concept[s]”.²² “Closely related” does not mean “identical”; however, the Court treated the two terms interchangeably for the rest of the analysis.²³ Again, in *Miller v Railway Corporation of New Zealand*, the High Court referred to the fact that the New Zealand Railways Corporation Act 1981 defines the Railway Corporation as “an instrument of the executive government” and concluded simply: “That must mean it is to be regarded as the Crown.”²⁴

The advantage of equating the Crown’s boundaries with those of the executive – as the courts did in *Miller* and *New Zealand Medical Council* – is that it makes the Crown a more coherent embodiment of the executive. The reach of ministerial control acts as the demarcator between the executive and the wider public sector.

However, there is little conscious appreciation that the control test should be applied in this way. This is illustrated by Joseph’s analysis of the control test in relation to the categories of Crown entities in his authoritative text, *Constitutional and Administrative Law in New Zealand*. The following paragraphs show that Joseph’s analysis perpetuates the misalignment between the Crown (as delineated by the control test) and the ambit of executive government. Courts have cited Joseph’s analysis with approval, which suggests that his view is now part of the judicial analysis.²⁵

²² At 326.

²³ See, for example, at 331.

²⁴ *Miller*, above n. 20, at 24.

²⁵ For example, *Stafford*, above n. 17, at [74] and [84]; *Vu v Ministry of Fisheries* 2010 WL 2020879 at [17].

It will be recalled that the Crown Entities Act 2004 creates five categories of Crown entities. These are statutory entities, Crown entity companies, Crown entity subsidiaries, school board of trustees and tertiary education institutions.²⁶ There are three subcategories of statutory entities, namely, Crown agents, Autonomous Crown Entities (ACEs) and Independent Crown Entities (ICEs).²⁷ Joseph considers that “Crown agents are the only Crown entities that fall squarely under the Crown’s umbrella.”²⁸ This is because Crown agents “must give effect to government policy when directed by the responsible Minister”.²⁹ ACEs and ICEs are unlikely to meet the necessary threshold of ministerial control to be within the ambit of the Crown: the former are only required to “have regard to government policy when directed by the responsible Minister” and the latter are “generally independent of government policy.”³⁰ Accordingly, Joseph considers ACEs and ICEs to be statutory entities that are not part of the Crown.³¹

By contrast, Joseph appears implicitly to accept that ACEs and ICEs are part of the executive branch.³² Joseph’s views on the ambit of the executive branch are less clear-cut³³ but it seems highly likely that he considers statutory entities to be part of the executive branch. This is because he describes the “modern executive” as including “multifarious statutory public bodies” elsewhere in his text.³⁴ He further writes that the Schedules to the Ombudsman Act 1976 and Official Information Act 1982 list many entities that “fall within the province of executive government.”³⁵ The Schedules to these Acts include many ACEs and ICEs. Thus, according to Joseph’s analysis, there are entities such as ACEs and ICEs that are part of the executive government but outside the ambit of the Crown as defined by the control test.

²⁶ Crown Entities Act 2004, s 7(1).

²⁷ *Ibid.*, s 7(1)(a).

²⁸ Joseph, above n. 8, at 620.

²⁹ Crown Entities Act 2004, s 7(1)(a).

³⁰ *Ibid.*

³¹ Joseph, above n. 8, at 620.

³² At 201.

³³ See discussion in Section 3.4.

³⁴ Joseph, above n. 8, at 201.

³⁵ *Ibid.*

Joseph's analysis makes it doubtful that the control test has succeeded in making the Crown a coherent embodiment of the executive branch. On the contrary, the Crown appears to exclude a considerable part of the executive such as ACEs and ICEs. The ambit of the Crown thus adds another layer of conceptual complexity to the existing uncertainty regarding where the executive's boundaries lie in relation to the wider public sector.³⁶

Further to these issues, the application of the control test can be highly uncertain. This is because the control test focuses on the "nature and degree" of control as opposed to the existence of control.³⁷ As Hogg, Monahan and Wright observe:³⁸

Between the extremes of full control and no control lies a continuum in which the courts have ranged without clear rules, often simply repeating that it is the "nature and degree of control" that has to be assessed.

The debate over whether State-Owned Enterprises (SOEs) are part of the Crown exemplifies the issue of uncertainty. In *Medical Council of New Zealand*, the Court of Appeal suggested, *obiter*, that the level of ministerial control over SOEs is sufficient to make SOEs part of the Crown.³⁹ The Court considered it relevant that ministers can give directions to SOEs in respect of their statement of corporate intent.⁴⁰ Joseph argues that it was "aberrant" for the Court to suggest this "when the shareholding ministers are distanced from the corporations' core functions and can exercise no control over their daily operations."⁴¹ However, other cases have referred to SOEs as "very much the Crown's creature."⁴² Recently, the Supreme Court held in *Ririnui v*

³⁶ See discussion in Section 3.4.

³⁷ *Medical Council of New Zealand*, above n. 16, at 327.

³⁸ Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at 464.

³⁹ *Medical Council of New Zealand*, above n. 16, at 330.

⁴⁰ *Ibid.*

⁴¹ Joseph, above n. 8, at 621 – 622.

⁴² *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at 520 ["1994 New Zealand Māori Council case"]; *Ririnui v Landcorp Farming Limited* [2016] NZSC 62 at [86]; *Stafford*, above n. 17, at [10].

*Landcorp Farming Limited*⁴³ that the Crown can exercise a sufficient degree of indirect control over the way in which SOEs control their assets for Māori to halt the sale of former Crown land that now belonged to an SOE. It remains to be seen whether lower courts will accept this view when applying the control test in the context of an SOE's claim to Crown immunities, or whether it will attempt to distinguish *Ririnui* because of policy concerns. One suspects that the application of the control test will be similarly difficult to predict whenever the entity in question is subject to some level of ministerial control, regardless of how minimal the control is. The status of ACEs is likely to be particularly debatable, as they are required to have regard to government policy. ICEs would probably escape the controversy because they are generally independent of government policy. In summary, the control test is insufficiently certain to render the Crown a clear embodiment of the executive branch.

6.3.2. "Prejudice" test

An alternative to the "control" test is the "prejudice" test. Courts will extend the Crown's immunity to an entity if not to do so would prejudicially affect the Crown.⁴⁴ New Zealand courts generally use the control test but have historically applied the prejudice test in the context of the Crown's immunity from statute.⁴⁵ This was a result of the wording of s 5(k) of the Acts Interpretation Act 1924, which provided that the Crown was exempt from statute in the absence of express contrary provision where the "rights of Her Majesty, her heirs or successors" would be affected. There is no reference to the "rights of the Crown" under the equivalent provision under s 27 of the Interpretation Act 1999, which makes the prejudice test less common in New Zealand.

⁴³ *Ririnui*, above n. 42.

⁴⁴ *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584 (HL) at 630; *Lower Hutt City v Attorney-General* [1965] NZLR 65 (CA) at 81; see also Joseph, above n. 8, at 673.

⁴⁵ See for example, *Victory Park Board v Christchurch City* [1965] NZLR 741 (SC) at 747; *Lower Hutt City*, above n. 44, at 81; *Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301 (SC) at 309.

A comparison between the prejudice and the control tests points to the control test as being more preferable, or at least less problematic. This is because of two reasons. First, the ambit of the Crown under the prejudice test is indefinite. It is potentially broader than that of the executive branch and public sector. Joseph writes that “[a]nyone may be the Crown (whether servant, agent or independent contractor) where the Crown’s interests are potentially adversely affected.”⁴⁶ This is apparent from decisions where private contractors were able to claim the Crown’s exemption from statute because of their contractual relationship with the Crown. In *Lower Hutt City-Council v Attorney-General*, two independent contractors who were carrying out plumbing work as part of a government housing project were exempt from the Drainage and Plumbing Regulations 1959 because enforcing those regulations would “affect the ‘rights’ of the Crown.”⁴⁷ In *Winter v Harvey*, a person who had rented his bulldozer to the Department of Works was also exempt from the Heavy Motor-vehicle Regulations 1940.⁴⁸ The control test has the advantage over the prejudice test of restricting the Crown’s immunity from statute to the entities that are subject to ministerial control.

Secondly, the focus on “prejudice” to the Crown means that the prejudice test is specifically suited to the question whether an entity is entitled to the Crown’s immunity. Admittedly, the question of the Crown’s ambit arises mostly in this context.⁴⁹ However, courts also have to delineate the Crown’s ambit in the context of determining whether the Crown is liable for an entity’s action or whether land that is subject to a claim by Māori and is held by a public entity is in “the hands of the Crown”.⁵⁰ It would be illogical to apply the prejudice test in such situations because the finding that an entity is the Crown would prejudice the Crown; that is, the Crown would incur liability or have to return the land to Māori.

⁴⁶ Joseph, above n. 8, at 634.

⁴⁷ *Lower Hutt City*, above n. 44, at 75.

⁴⁸ *Winter v Harvey* (1947) 42 MCR 25.

⁴⁹ Joseph, above n. 8, at 631; Hogg, Monahan and Wade, above n. 38, at 481; Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013) at 161.

⁵⁰ For example, see *Stafford*, above n. 17, at [49] and [86]; see Section 6.5.

6.3.3. “Function” test

Courts occasionally ask whether an entity is carrying out a “public function” as part of determining whether that entity is within the Crown’s ambit. This is the “function” test. It aligns the Crown’s ambit with the concept of “publicness” or “the province of government”.⁵¹

The function test was the dominant analysis of the reach of immunities in the 19th century.⁵² The control test subsequently displaced it. Courts in the United Kingdom, Australia, Canada and New Zealand now mostly use either the control or the prejudice test.⁵³ Nonetheless, Hogg, Monahan and Wade note that “vestiges of this discredited functions test continue to surface in judicial dicta in modern times.”⁵⁴ They identify a number of cases in Canada and other jurisdictions where the public nature of an entity’s function influenced the court’s finding that the entity was part of the Crown.⁵⁵

The function test featured in the Court of Appeal’s analysis in *Medical Council of New Zealand*. The Court recognised that one of the questions that courts ask to decide an entity’s claim to the Crown’s status is whether “the functions [of the entity] properly belong within the province of government”.⁵⁶ While the Court acknowledged that “the emphasis on function can cause difficulty”, it proceeded to take into account the fact that “the promotion and maintenance of health for New Zealanders is a major state responsibility.”⁵⁷

⁵¹ *Medical Council of New Zealand*, above n. 16, at 327.

⁵² Joseph, above n. 8, at 619.

⁵³ *Ibid*; Hogg, Monahan and Wade, above n. 38, at 463 – 466.

⁵⁴ Hogg, Monahan and Wade, above n. 38, at 464.

⁵⁵ *Ibid.*, citing *Tamlin v Hannaford* [1950] 1 KB 18 at 25 (CA); *Electricity Commission of New South Wales v Australian United Press* (1955) 55 SR (NSW) 118 at 137 (SC); *R v Ontario Labour Relations Board, ex parte Ontario Food Terminal Board* [1963] 2 OR 91 at 95 (CA); *Goodfellow v Commissioner of Taxation* (1977) 51 ALJR 437 at 442 (HCA); *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 349 (HCA); *Medical Council of New Zealand*, above n. 16; *BC v Lafarge Canada Inc.* [2007] 2 SCR 86; *Nova Scotia Power v Canada* [2004] 3 SCR 43 at [12].

⁵⁶ *Medical Council of New Zealand*, above n. 16, at 326 – 327.

⁵⁷ At 327.

There is widespread criticism of the function test. Joseph describes the phrase “the province of government” as “a shapeless expression”.⁵⁸ Griffith believes that the function test was only appropriate in the 19th century because notions of the limits of government were “so rooted in the ground of society itself that they were not considered to be matters of political controversy among the judges.”⁵⁹ Similarly, Hogg, Monahan and Wright note that the function test developed at a time when the preservation of law and order were the primary purposes of government.⁶⁰ Since then, the province of government has become “capable of indefinite expansion”.⁶¹ It is Parliament rather than the courts which now decides which functions government should perform and which it should privatise.⁶² Judicial determinations of which functions are “public” run the risk of freezing “publicness” at a point in time or conflicting with the political view on what government’s functions should be.⁶³

However, recent human rights legislation may have revived the function test by giving a new meaning to the concept of “public function”. There is a growing tendency in New Zealand and United Kingdom human rights statutes to impose on courts the task of discerning which bodies are carrying out a “public” function.⁶⁴ For example, s 3(b) of the New Zealand Bill of Rights Act 1990 requires the courts to determine whether an entity is acting “in the performance of a public function, power or duty” for the purposes of subjecting that entity to the Bill of Rights Act. Part 1A of the Human Rights Act 1993 applies to the same set of entities.⁶⁵ New Zealand courts now increasingly determine whether an entity’s actions can be subjected to judicial review on the basis of whether that entity is carrying out a public function.⁶⁶ The focus on public function

⁵⁸ Joseph, above n. 8, at 619.

⁵⁹ JAG Griffith “Public corporations as Crown servants” (1952) 9(2) UTLJ 169 at 184.

⁶⁰ Hogg, Monahan and Wade, above n. 38, at 463.

⁶¹ Ibid.

⁶² Griffith, above n. 59, at 184.

⁶³ Janet McLean *Searching for the State in British Legal Thought* (Cambridge University Press, New York, 2012) at 303 - 304.

⁶⁴ At 303 – 308; see *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at 247 – 248.

⁶⁵ Human Rights Act 1993, s 20J.

⁶⁶ For example, see *Wilson v White* [2005] 1 NZLR 189 (CA); *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC); *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26; see also Joseph, above n. 8, at 881 – 882.

replaces the previous requirement that an entity must have statutory origins to bring it within the scope of judicial review.⁶⁷ There would be a conceptual unity to a State theory that embraces all entities which are subject to the New Zealand Bill of Rights Act by virtue of s 3 of the Act, so that the ambit of the State coincides with the public sphere.

Local government bodies are a good example of how the function test will bring more conceptual unity. Local bodies are not generally considered part of the Crown because they are not part of central government.⁶⁸ Several Australian decisions have held that the control test does not extend the ambit of the Crown to local bodies because ministers have no legal control over them.⁶⁹ Notwithstanding this, it is undeniable that local bodies carry out executive functions.⁷⁰ They are subject to the same public law obligations as central government. They have duties under the New Zealand Bill of Rights Act;⁷¹ their actions are reviewable by ombudsmen;⁷² they are obliged to provide official information on requests;⁷³ courts can judicially review their actions.⁷⁴ Replacing the Crown with a State that is demarcated by public function would bring local bodies within the umbrella of the State. It would resolve the present anomaly that the Crown, which is the legal embodiment of government, excludes entities that carry out key executive functions.

⁶⁷ For example, see *Hayes v Logan* [2005] NZAR 150 (HC) at [48]; *Easton v Human Rights Commission* [2009] NZAR 575 (HC) at [21]; *Boscawen v Attorney-General* [2009] NZCA 12 at [30]; see also Joseph, above n. 8, at 881 – 882.

⁶⁸ McLean, above n. 63, at 141; Cris Shore and Margaret Kawharu “The Crown in New Zealand” (2014) 11(1) *Sites: New Series* 17 at 29 – 30; Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013 at 168; Janine Hayward “In search of a Treaty partner: who, or what, is ‘the Crown’?” (Doctoral thesis, Victoria University of Wellington, 1995) at 214 – 216.

⁶⁹ For example, see *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 520; *Ellis v Commissioner of Main Roads* (1991) 74 LGRA 96 at 99-100.

⁷⁰ Joseph, above n. 8, at 201; Shore and Kawharu, above n. 68, at 29-30.

⁷¹ New Zealand Bill of Rights Act 1990, s 3(b); see *New Health New Zealand Incorporated v South Taranaki District Council* [2018] NZSC 59 at [175].

⁷² Ombudsmen Act 1975, Schedule 1, Part 3.

⁷³ Local Government Official Information and Meetings Act 1987.

⁷⁴ For example, see *Easton v Wellington City Council* [2010] NZSC 10; *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA); Joseph, above n. 8, at 880.

The function test is currently not an appropriate assessment of the Crown's ambit because equating the Crown with the public sector would vastly expand the scope of the Crown's immunities. Chapter 11 proposes a State theory where the reach of immunities would not be linked to the State's ambit and hence the function test would be a feasible demarcator of the State.

6.3.4. Servants, agents and other emanations

There are numerous labels to describe the relationship between an entity and the Crown. An entity can be the Crown's "servant", "agent" or "officer".⁷⁵ Several statutes refer to "instruments of the Crown".⁷⁶ Additionally, an entity may have "Crown status";⁷⁷ it could be an "emanation from the Crown"⁷⁸ or even a "creature" of the Crown.⁷⁹

The multiplicity of terms creates confusion about whether these terms have different applications. Most would agree that "servant" and "agent" have distinct meanings. The definition of "agent" in s 2 of the Crown Proceedings Act 1950 includes "independent contractors". By contrast, "servant" indicates employees.⁸⁰ However, other terms such as "emanation" appear to add little conceptual value. In *International Railway Co v Niagara Parks Commission*, the Privy Council criticised the lower court's use of the expression "emanation":⁸¹

If [the expression "emanation"] is intended to refer to the [entity] in some capacity other than that of agent or servant, it is impossible to ascertain...what the legal significance of that capacity may be. The word "emanation" is hardly applicable to a person or body having a corporate capacity.

⁷⁵ Crown Proceedings Act 1950, s 2.

⁷⁶ For example, see Health and Safety at Work Act 2015, ss 5 and 6; Fisheries Act 1996, s 294.

⁷⁷ *Bank Voor Handel en Scheepvaart v Slatford* [1952] 1 All ER 314 at 323.

⁷⁸ For example, see *Gilbert v The Corporation of Trinity House* (1886) 17 QB 795 at 801; *Stafford*, above n. 17, at [74] – [75]; *Burrows v New Zealand Police* [2018] NZHC 2088 at [72].

⁷⁹ 1994 New Zealand Māori Council case, above n. 42, at 520; *Stafford*, above n. 17, at [10] and [79].

⁸⁰ Philip Joseph "The executive in litigation" *Laws of New Zealand* (online ed) at [111].

⁸¹ *International Railway Co v Niagara Parks Commission* [1941] AC 328 at 342-3.

Their Lordships recommended that courts should only use the words “agent” or “servant” to “avoid obscurity”.⁸²

However, some defend the use of terms beyond “servant” and “agent”. In *Bank Voor Handel en Scheepvaart v Slatford*,⁸³ Devlin J found the terms “servant” and “agent” too imprecise and did not believe a master-servant relationship properly described a minister’s relationship with the Crown. His Honour preferred to use the term “Crown status”.⁸⁴

The status of the Police is also conceptually difficult to reconcile with the concepts of either “servant” or “agent”. In *Conway v Rimmer*, Lord Reid noted that the Police are “peculiar” because they are “not servants...and do not take orders from the Government” but are “carrying out an essential function of Government.”⁸⁵ Joseph argues that the Police have a “quasi-Crown status” because they are “in the service of the Crown” but “not Crown servants *per se*.”⁸⁶ The Policing Act 2008 sidesteps the issue by labelling the Police force “an instrument of the Crown”⁸⁷ while providing for the Police to act “independently and impartially”.⁸⁸ Thus, there is some logic in extending the terminology beyond “servants” and “agents”. However, the precise distinction between these terms and words such as “instrument” remains unclear.

New Zealand courts have occasionally struggled to reconcile the question whether an entity should be classed as a Crown “servant”, “agent” or other “emanation” with the control and prejudice tests. For example, in *Accident Compensation Corporation v Stafford*, the New Zealand High Court considered whether the Accident Compensation Corporation (ACC) is an “agent”,

⁸² Ibid.

⁸³ *Slatford*, above n. 77, at 323.

⁸⁴ Ibid.

⁸⁵ *Conway v Rimmer* [1968] AC 910 (HL) at 953.

⁸⁶ Joseph, above n. 8, at 631.

⁸⁷ Policing Act 2008, s 7(1).

⁸⁸ Ibid. at s 8(e).

“emanation” or “instrument” of the Crown.⁸⁹ The Court determined that the ACC is an agent of the Crown;⁹⁰ however, Collins J observed in the very next line that “it is not particularly helpful to ask if ACC is an agent of the Crown”.⁹¹ His Honour then proceeded to analyse the extent of ministerial control over the ACC to determine if the ACC was the Crown for the purposes of the proceeding.⁹²

A similar pattern of reasoning can be seen in *Lower Hutt City v Attorney-General*.⁹³ The Court of Appeal had to decide whether two independent contractors enjoyed the Crown’s immunity from statute. Their Honours found that the terms of the contract meant that the contractors were neither agents nor servants.⁹⁴ However, the Court ultimately held that the immunity attached to the contractors because applying the statutory requirements would prejudice the Crown’s rights.⁹⁵

These cases suggest that occasionally, the terms “servant”, “agent”, “emanation” and so on are at best labels to be applied after having determined that an entity falls within the ambit of the Crown through the control or prejudice test, rather than analytic tools to determine whether or not an entity falls within the ambit of the Crown. This is also the opinion of Australian academic Nicholas Seddon.⁹⁶ Seddon comments on the “confusion” in other jurisdictions on the relevance of an entity’s relationship of agency with the Crown.⁹⁷ He writes that “[t]he relevant inquiry is not whether the body is acting as an agent so much as whether the body should enjoy a government immunity.”⁹⁸

⁸⁹ *Stafford*, above n. 17, at [75].

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² At [81] and onwards.

⁹³ *Lower Hutt City*, above n. 44.

⁹⁴ At 76, *per* Turner J; at 79, *per* Hutchinson J.

⁹⁵ At 75, *per* North; 78, *per* Turner J; 81, *per* Hutchinson J.

⁹⁶ Seddon, above n. 68, at 158-160.

⁹⁷ At 159.

⁹⁸ At 158.

Seddon's clarification suggests that New Zealand courts are sometimes waylaid by the multiplicity of terms when they should simply proceed to use the control or prejudice test to decide whether an entity enjoys the Crown's immunity or is within the Crown's control. It is testament of the conceptual confusions surrounding the question whether entities fall within the ambit of the Crown.

6.4. The historic evolution of the Crown's boundaries

The preceding analysis set out the misalignment between the boundaries of the Crown, and the executive branch. The ensuing discussion examines why this misalignment has arisen. It shows that the Crown's boundaries were driven more by policy than principle: they were a result of the courts' attempts to confine immunities to the Crown and prevent the wider public sector from enjoying them.

6.4.1. Public functions and the Crown

The Crown and the public sphere were independent concepts for the first half of the 19th century. The Crown was associated with the Sovereign and ministers (who formed "central" government), whereas the notion of "publicness" concerned the distinction between public benefit and private profit.⁹⁹ McLean writes:¹⁰⁰

'Publicness' existed across a very broad spectrum of both publicly owned and privately owned bodies. The Crown could not represent such a broad and fluid range of bodies. This was especially so given that it was not central government per se but rather a combination of central government and locally held initiative that was at the forefront of the expanding functions...

⁹⁹ McLean, above n. 63, at 141; Griffith, above n. 59, at 170 – 172.

¹⁰⁰ McLean, above n. 63, at 143.

The common law accorded certain immunities to the Crown alone whereas other immunities attached to both, the Crown and entities carrying public functions.¹⁰¹ In *Gidley v Palmerston*, Dallas CJ held for the defendant (the Secretary of War) on two separate grounds: first, the defendant was acting as “the agent or officer of the Crown”¹⁰² and secondly, there was a “wider ground” that “an action will not lie against a public agent for anything done by him in his public character or employment”.¹⁰³ Similarly, the immunity from local rating protected not just Crown servants but also any persons who occupied buildings for a public purpose. In *R v Terrott*,¹⁰⁴ Lord Ellenborough CJ described the subjects of the immunity from rates as “servant[s] of the Crown, or...any public body, or...[persons exercising a] public duty therein, and [who] have no beneficial occupation or emolument resulting from it in any personal and private respect.”¹⁰⁵

The fact that the immunities went hand-in-hand with publicness meant that the focus of an enquiry into an entity’s claim to immunity depended on the public nature of that entity’s function. There was no need to ascertain the Crown’s ambit. The Crown’s distinct immunities (such as the immunity from mandatory orders) were restricted to the Crown’s servants or agents, who were almost invariably ministers.¹⁰⁶ Therefore, the ambit of “Crown” did not reach farther than that of its ministers and government departments.

The 1850s and 1860s saw a shift in the nature of publicness which resulted in the Crown occupying a more central role in the assessment of the bodies that enjoyed immunities.¹⁰⁷ McLean writes that as late as the 1840s, the public sphere had been marked by a lack of profitability and the notion of “public undertakings” was limited to core activities such as the building of roads and drains.¹⁰⁸ By the 1860s, however, “public” bodies such as municipalities had

¹⁰¹ At 141.

¹⁰² *Gidley v Palmerston* (1822) 129 Eng. Rep. 1290 at 1294.

¹⁰³ *Ibid.*

¹⁰⁴ *R v Terrott* (1803) 3 East 506 at 513-4.

¹⁰⁵ *Ibid.*

¹⁰⁶ See discussion in Section 8.3.1.

¹⁰⁷ McLean, above n. 63, at 140-143.

¹⁰⁸ At 143 – 146.

begun to trade for profit.¹⁰⁹ The concept of “undertakings of a public nature” also broadened significantly to include the creation of recreational facilities.¹¹⁰ These newer forms of publicness meant that the mere fact that an entity carried out public functions became less compelling as a justification for that entity to enjoy immunities.

Courts responded by confining immunities that previously accompanied the performance of any public function to the performance of functions that were “both public and governmental”.¹¹¹ In *Mersey Dock Harbour Board v Cameron*, the majority of the House of Lords found that a municipal dock did not enjoy immunity from rates because the immunity attached only to Crown servants such as departments of the state and bodies “*in consimili casu*” (that is, “in a similar class” to Crown servants).¹¹² Blackburn J described the latter category of bodies as including local police, assizes, county courts and jails. His Honour considered that these bodies were not “strictly speaking, servants of the Sovereign” but their activities “f[e]ll within the province of government.”¹¹³ This analysis bolstered the Crown’s relevance to assessing the ambit of immunities through the requirement that only public bodies in a similar class to Crown servants could enjoy immunities. Subsequent cases between the 1860s and 1900s continued to ask, “is this activity within the province of government?”, to determine whether an entity was in a similar class to Crown servants and could claim an immunity.¹¹⁴ The mere fact that the entity was carrying out a public function was no longer enough.

¹⁰⁹ At 147

¹¹⁰ At 145.

¹¹¹ Griffith, above n. 59, at 178.

¹¹² *Mersey Docks and Harbour Board Trustees v Cameron* [1864-65] 11 Eng. Rep. 1405 at 1413, *per* Blackburn J.

¹¹³ *Ibid.*

¹¹⁴ Griffith, above n. 59, at 173 – 178, citing *Mersey Docks and Harbour Board v Gibbs* (1866) LR 1 HL 93; *Coomber v Berks JJ* (1883) 9 App Cas 61; *R v McCann* (1868) LR 3 QB 677; *In re Wood’s Estate* (1886) 31 Ch D 607; *Graham v Public Works Commissioners* [1901] 2 KB 781; *Roper v Public Works Commissioner* [1915] 1 KB 45.

Cases after *Cameron* began to construe the Crown as “the sole marker of immunity”.¹¹⁵ Courts ceased to recognise the “wider ground” of public immunity that Dallas CJ had noted in *Gidley*.¹¹⁶ Instead, courts treated the Crown as the source of all immunities, even when applying the immunities to the broader category of entities who were not Crown servants but were “in a similar class” to Crown servants. In *Coomber v Berks JJ*, Lord Blackburn explained that this class of entities enjoyed immunities when acting for “those purposes of the government which are, according to the theory of the Constitution, administered by the Sovereign.”¹¹⁷ The rationale for immunity was not that it was a public function but the fact that it was a function carried out in the course of service to the Sovereign. The result, according to McLean, was that Crown immunity became “a hollow formalistic concept”;¹¹⁸ immunities came to be associated with the Crown “not on the basis of any functional or other explicitly normative distinction between the public and private.”¹¹⁹

6.4.2. Emergence of the control test

Cases from the turn of the 20th century show a shift in the analysis of whether an entity could claim the Crown’s immunities. The earlier focus on whether the entity’s activities fell within “the province of government” gave way to an enquiry about the relationship between the entity and the Crown. The level of ministerial control over the entity became the determinative factor in whether that entity was to be treated as a servant or agent of the Crown for the purposes of immunity.¹²⁰ Thus, the Privy Council found in *Fox v Government of Newfoundland* that an education board did not enjoy the Crown’s priority to debt because the board’s discretion on how to use its funds was “a power which is independent of the Government”.¹²¹ The existence of discretionary power also precluded a meat industry board from enjoying the Crown’s priority

¹¹⁵ McLean, above n. 63, at 141.

¹¹⁶ *Gidley*, above n. 102, at 1294.

¹¹⁷ *Coomber*, above n. 114, at 69-70.

¹¹⁸ McLean, above n. 63, at 142

¹¹⁹ At 143.

¹²⁰ Griffith, above n. 59, at 178 – 183.

¹²¹ *Fox v Government of Newfoundland* [1898] AC 667, quoted in *Bank voor Handel en Scheepvaart N.V. v Administrator of Hungarian Property (No 1)* (1952-1955) 35 TC 311 at 350.

to debts in *Metropolitan Meat Industry Board v Sheedy*.¹²² The Privy Council found that the board, a statutory corporation, was:¹²³

a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs.

Again, in *Tamlin v Hannaford*, Denning LJ declined to hold that the British Transport Commission a servant or agent of the Crown because “the control over it which is exercised by the Minister of Transport...is insufficient for the purpose.”¹²⁴ The function of an entity continued to feature sporadically in assessments¹²⁵ of immunity but the control test became the dominant approach.

The driver behind the shift from the function to the control test appears to have been a judicial desire to further narrow the reach of the Crown’s immunities. McLean writes that courts “a consistently restrictive approach to which bodies or activities should attract immunities and privileges”.¹²⁶ Likewise, Hogg notes that courts tend to require a high degree of control for an entity to be considered part of the Crown; “[t]he reason, without doubt, is a justified reluctance on the part of the courts to extend the special privileges of the Crown any further than necessary.”¹²⁷

6.5. How necessary is the demarcation between the Crown and the public sector?

The preceding analysis establishes that the present demarcation between the Crown and the wider public sector is a result of courts construing the ambit of the Crown narrowly to confine immunities to the Crown. McLean considers that the Crown could have come to represent the

¹²² *Metropolitan Meat Industry Board v Sheedy* [1927] AC 899.

¹²³ At 905-906.

¹²⁴ *Tamlin v Hannaford* [1950] 1 KB 18 at 25.

¹²⁵ See Section 6.3.3.

¹²⁶ McLean, above n. 63, at 159.

¹²⁷ Hogg, Monahan and Wright, above n. 38, at 466.

whole of the public sphere had the courts not taken “a consistently restrictive approach” to the Crown’s ambit out of the concern about expanding the sphere of immunities.¹²⁸ She writes:¹²⁹

There are several points at which the Crown could have come to personate the state and to represent unified public law norms. That never happened. Instead, the Crown came to represent only a part of the public sphere and became the subject of, and often defined by, formalistically applied immunities and privileges.

Similarly, Harlow has suggested that “[i]f government were to dispose once and for all of the prerogative powers [meaning the immunities that attach to the Crown], then the doctrine of unity of government would be innocuous.”¹³⁰

McLean and Harlow’s observations raise the question, would it be possible to develop a State entity that coherently embodies the entire public sphere if the courts do not have to demarcate the reach of the Crown’s immunities? If not, what further reforms would be necessary before the State can embody the whole public sector? The remainder of this section addresses these questions.

Several statutes provide immunities to, or limit the actions available against, “the Crown”, “instruments of the Crown” or “instruments of the Executive Government”.¹³¹ Some immunities cannot be justified and should be abolished: Chapters 7, 8 and 9 identifies these as the immunities from direct liability in tort, mandatory orders and statute. Other immunities are functionally justifiable and would need to remain. However, it is submitted that these immunities

¹²⁸ McLean, above n. 63, at 159.

¹²⁹ At 163.

¹³⁰ Carol Harlow “The Crown: wrong once again?” (1977) 40(6) *Modern Law Review* 728 at 730.

¹³¹ For example, see Crown Proceedings Act 1950, ss 6, 17 and 27; Resource Management Act 1991, ss 4(8) and 4(9); Income Tax Act 2007, ss YA 1 and CW 38; Law Commission *Crown liability and judicial immunity: a response to Baigent’s case and Harvey v Derrick* (NZLC R37, 1997) at 98 – 172.

should attach to a clearly defined subset of entities as opposed to ill-defined concepts such as “the Crown”, “the Executive Government” or their “instruments”.

Two examples illustrate this argument. Section 27 of the Crown Proceedings Act 1950 gives courts the jurisdiction to make orders of discovery and interrogatory against the Crown but does not prejudice the Crown’s ability to decline disclosure of certain documents if disclosure would be injurious to public interest. There is undeniably a functional justification for this immunity because the public interest in the non-disclosure of certain sensitive documents may override an individual party’s interest in being able to view all documents relevant to the proceeding.¹³² However, courts struggle to ascertain which entities are “the Crown” for the purposes of s 27.¹³³ A second example is s CW 38 of the Income Tax Act 2007. This section exempts the income of any public authority from taxation. The rationale for the exemption is that government bodies do not need to pay tax to the government. The issue is interpreting what a “public authority” is. Section YA1 of the Act defines “public authority” as meaning “every department or instrument of the Executive Government”. The Court of Appeal’s decision in *Medical Council of New Zealand*, discussed previously, showcases the difficulty of analysing whether an entity is “an instrument of the Executive Government”.¹³⁴

Such uncertainty can easily be avoided if Parliament replaces the terms “Crown”, “Executive Government” and “instruments” with more clearly defined entities in these sections. Schedules to the relevant legislation could list the entities to which the provision applies. There would be a twofold benefit to this exercise. First, legislators would have to turn their minds to the question which entities have a functional need for an immunity. Secondly, courts would no longer need to

¹³² Law Commission *The Crown in court – a review of the Crown Proceedings Act and national security information in proceedings* (NZLC R135, 2015) at [5.36].

¹³³ For example, see *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530 (CA); *Berryman v Solicitor-General* [2005] NZAR 512.

¹³⁴ *Medical Council of New Zealand*, above n. 16.

determine if an entity is the Crown in situations where the entity claims the benefit of an immunity.

It is submitted that redrafting immunities in this manner would remove the bulk of scenarios where it is necessary to delineate the Crown. Disputes regarding the reach of Crown immunity form the most common scenario where New Zealand courts have to ascertain the Crown's boundaries.¹³⁵ This is also the case in other jurisdictions. Hogg, Monahan and Wright note that the need to ascertain the Crown's boundaries "usually arises" in Canadian courts in the context of Crown immunity. He considers the immunity from statute to be "the most common modern claim".¹³⁶ Seddon has similar observations in the Australian context:¹³⁷

The practical significance of the question whether a particular body is a manifestation of the Crown is, as already noted, that the body will be arguing some form of privilege or immunity, usually immunity from statute.

However, redrafting immunities would not by itself be sufficient to remove the distinction between the Crown and the wider public sector. This is because there are three other scenarios where the Crown's ambit is potentially relevant to judicial analysis. It is necessary to consider how the law would grapple with these situations without delineating the Crown.

The first situation is where a statute or other legal instrument sets out a rule that applies only to "the Crown" or "instruments of the Crown", so that courts have to decide whether a party to a proceeding can avail of the special rule. An example is s 100 of the Residential Tenancies Act 1986, which provides that "[i]n any case where the Crown or an instrument of the Crown is a party, the registered valuer [who provides a report to the Tribunal] shall not be an employee of the Crown." Interpreting this provision requires the Tribunal to determine whether a party to a

¹³⁵ See Joseph, above n. 8, at 631.

¹³⁶ Hogg, Monahan and Wright, above n. 38, at 481.

¹³⁷ Seddon, above n. 68, at 157.

proceeding is the Crown or an instrument of the Crown. Rules that are specific to “the Crown” retain the demarcation between the Crown and the wider public sphere. Such rules would need to be redrafted so that courts can readily identify the entities to whom the rules apply without demarcating the Crown. For example, the reference to “the Crown” and “instruments of the Crown” may be replaced with a reference to “government departments” and “Crown agents” as defined under s 7 of the Crown Entities Act 2004, as these terms have specific meanings.

The second situation where courts currently have to delineate the Crown is to decide whether the Crown can be liable for another entity’s action.¹³⁸ Section 6(1)(a) of the Crown Proceedings Act 1950 makes the Crown liable for the torts of servants and agents of the Crown. This requires courts to determine whether or not an entity is a Crown servant or agent. For example, in *Carrington v Attorney-General*, the Crown was liable for a wrongful arrest by a detective sergeant.¹³⁹ In *Attorney-General v Geothermal Produce NZ Ltd*, the Court of Appeal found a government department liable for the negligence of an independent contractor.¹⁴⁰ It is to the plaintiff’s advantage in these cases for an entity to be deemed part of the Crown because of the Crown’s greater financial capacity to pay damages.¹⁴¹ Abandoning the enquiry into whether or not an entity is the Crown could have one of two adverse consequences. One possibility is that the courts would decide that the Crown is no longer liable for entities such as the Police or independent contractors. Hogg, Monahan and Wright consider that this would be an “unacceptable” result because it would limit the plaintiff’s prospects of recovery.¹⁴² Conversely, courts may hold that the Crown embodies the whole public sector and the central government is therefore liable for the actions of any public sector entity. This would be inconsistent with these

¹³⁸ Crown Proceedings Act 1950, ss 2 and 6(1)(a); see Joseph, above n. 8, at 631, citing *Attorney-General v Geothermal Produce New Zealand Ltd* [1987] 2 NZLR 348 (CA); *Carrington v Attorney-General* [1972] NZLR 1106 (SC); *Duffy v Attorney-General* (1985) 1 CRNZ 599 (HC); *Craig v Attorney-General* (1986) 2 CRNZ 551 (HC); *Willis v Attorney-General* [1989] 3 NZLR 574 (CA).

¹³⁹ *Carrington*, above n. 138.

¹⁴⁰ *Geothermal Produce*, above n. 138.

¹⁴¹ Hogg, Monahan and Wright, above n. 38, at 481.

¹⁴² At 482.

entities' financial autonomy under the Public Finance Act 1989 and their autonomy from ministerial control.¹⁴³

A more effective solution would be for statute to specify the entities for which the central government may be liable, such as ministers, government departments, public servants employed in the government departments and independent contractors.¹⁴⁴ This would sidestep the common law enquiries such as the control test and the need to assess whether an entity is the Crown's servant, agent, emanation or other instrument.

A third scenario where courts have enquired into the Crown's boundaries is in the context of Māori land claims. In *Proprietors of Wakatu v Attorney-General*,¹⁴⁵ the Supreme Court found that the Crown held certain land that had historically belonged to the Wakatu iwi in trust for the iwi. Subsequently, in *Accident Compensation Corporation v Stafford*, the High Court had to determine whether a representative of the Wakatu iwi had a caveatable interest in land held by the Accident Compensation Corporation (ACC).¹⁴⁶ Collins J's opinion was that the proper question was whether the ACC land was land "in the hands of the Crown".¹⁴⁷ His Honour then asked if the ACC was an agent of the Crown and applied the control test to determine that ACC property may indirectly be in the Crown's control. However, the caveat could not become permanent for other reasons. *Stafford* suggests that the concept of the Crown delineates the public sector entities from whom Māori may still recover land.

It is submitted that the Crown-centric approach in *Stafford* is unwarranted. An alternative approach is to ask whether the land is subject to any private interest, in which case it cannot be returned to Māori. By contrast, land that is not subject to any private interest can be returned to

¹⁴³ Law Commission, above n. 131, at [88].

¹⁴⁴ See Section 11.4.4.

¹⁴⁵ *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17.

¹⁴⁶ *Stafford*, above n. 17.

¹⁴⁷ At [48], [49], [78].

Māori. The focus on private interest would be consistent with s 6(4A) of the Treaty of Waitangi Act 1975, which bars the Waitangi Tribunal from recommending that the Crown acquire or return any privately-owned land to Māori. Accordingly, the criterion for determining Māori land claims should not be the Crown's control over that land but the absence of private ownership interest. The Crown's boundaries would then be irrelevant for this enquiry.

In summary, there are currently four reasons why it is necessary to delineate the Crown from the wider public sector. The first is to ascertain the reach of the Crown's immunities; the second is to delineate the Crown where a rule applies only to the Crown or to "instruments of the Crown"; the third is the need to attribute liability for other entities' actions to the Crown; the fourth is to delimit the Crown's ambit in the context of Māori land claims.

6.6. Conclusion

Statutory and common law definitions of the ambit of the Crown are inconsistent and prevent a coherent understanding of the entities that are part of the Crown. The ambit of the Crown has no principled connection with the boundaries of the executive branch or public sector. An entity comes within the ambit of the Crown if that entity enjoys the Crown's immunity, is subject to the rules that apply only to the Crown, holds land that can be returned to Māori, or if the central government is liable for that entity's actions. It would become unnecessary to demarcate the Crown from the wider public sphere if the ambit of the Crown were irrelevant to identifying these entities. Chapter 11 proposes a State theory where there will be alternative ways to identify these entities; the Crown will no longer have to demarcate them. This will enable the proposed concept of the State to embrace the entire public sector, making legal analysis simpler and more coherent.

Chapter 7: The Crown in tort

7.1. Overview

The legal framework for Crown liability in tort suffers from significant shortcomings. The Crown is vicariously liable for the wrongs of its officers but seemingly cannot be directly liable. Institutional liability is difficult to establish where negligence is systematic rather than attributable to an individual officer. It is also uncertain whether the Crown can be liable where an officer enjoys a statutory immunity.

The chapter traces the origin of these shortcomings to the maxim “the king can do no wrong”. The maxim initially referred to the Sovereign’s infallibility. Eighteenth and 19th century English law extended the maxim to the Crown qua executive with two consequences. First, individuals with grievances against the executive could not sue the executive but had to bring a petition of right to the Sovereign, as if the executive were the Sovereign. Secondly, no petition of right was available against the Crown in tort; instead, aggrieved individuals had to sue responsible officers in their personal capacity. These rules indicated that English law confused the Sovereign with the Crown qua executive.

By contrast, contemporary Australian and New Zealand lawmakers recognised that government was a distinct entity which could not justifiably claim the Sovereign’s immunities from suit and in tort. The New Zealand Parliament enacted a series of statutory reforms beginning in the 1870s that incrementally abolished the Crown’s immunities. Unlike English courts, New Zealand courts were comfortable finding direct and institutional liability in tort.

The Crown Proceedings Act 1947 (UK) sought to modernise the principles of Crown liability in English law by abolishing the petition of right and making the Crown vicariously liable in tort. However, the statute left the Crown with a residual immunity from direct tortious liability. This in turn impeded findings of institutional liability and made it difficult to argue that the Crown should be liable when an officer enjoys an immunity. New Zealand enacted a substantially similar

statute and unwittingly imported these shortcomings from English law. The Crown Proceedings Act 1950 effectively restored immunities that the New Zealand Parliament had abolished in the 19th century.

The chapter contends that there is no justification for retaining New Zealand's residual immunity in tort. The immunity in tort extended to the Crown by error. Direct government liability in tort will resolve the present shortcomings.

7.2. The king can do no wrong

A fundamental maxim of English law was that the king could do no wrong. There were two facets to this maxim. The first was that no suit would lie against the king if he broke the law. He could order a man to be arrested or unlawfully deprive another of his land.¹ No remedy was available as of right because the king could not be sued in, or ordered by, his own courts.²

The second facet of the maxim, intended to mitigate the harshness of the first, was that the king was incapable of leaving a wrong unremedied. An aggrieved person could make a petition of right before the king when the king's actions had breached that person's legal right – either directly or through his servants. The king, being the fountain of justice, would then order his courts to “let right be done”. The courts would then grant a remedy to the aggrieved person.³

Beginning from the late 18th century, English law began to extend each facet of the maxim from the king to the executive government. Individuals had to petition the Sovereign for a remedy against the executive government and no petition of right was available against the Crown in tort because the king could neither do nor command a wrong. The ensuing discussion argues that the

¹ Clayton Roberts *The growth of responsible government in Stuart England* (Cambridge University Press, Cambridge, 1966) at 5.

² Janet McLean “The Crown in contract and administrative law” (2004) 24(1) OJLS 129 at 143; William Holdsworth “The history of remedies against the Crown” (1922) 38 LQR 141 at 142 and 146.

³ Holdsworth, above n. 2, at 142 and 150.

extension of the maxim to the Crown qua executive was irrational. It demonstrated English law's failure to comprehend the distinct nature of executive government.

7.2.1. Petition of right

The petition of right originated in the 14th century as a grace-and-favour remedy by which one could plead to the Sovereign that he right some injustice that he had committed either personally or through his servants.⁴ It was not possible to sue the Sovereign in his own courts as “the king can do no wrong” .⁵ The petition was an appeal to the Sovereign, who was the fountain of all justice, to remedy the injustice. The Sovereign would, if so minded, give his fiat to the courts to hear the petition and provide a remedy to the supplicant.

Prior to the late 18th century, the petition of right was available in situations where the king had either directly or through his servants acted in a way that adversely affected a person's rights. For example, the Court in *Gervais de Clifton* upheld the plaintiff's petition that the king's servants had wronged the plaintiff when they dug a trench on the king's land, causing the plaintiff's land to be flooded.⁶ In the *Bankers' case*, the Court found in favour of the bankers who had petitioned the king to honour a commitment by Charles II to pay annuities to them.⁷ These examples illustrate that the petition of right operated in a context where the Sovereign was proximate to the actions that had interfered with the supplicant's rights: hence the reliance on grace-and-favour.

The gap between Sovereign and the executive widened during the 18th century as the Sovereign ascended politics and his cabinet of ministers took control of the business of government.⁸ This should logically have extinguished the grace-and-favour approach to seeking remedies against

⁴ Roberts, above n. 1, at 4-7.

⁵ Holdsworth, above n. 2, at 144.

⁶ *Gervais de Clifton* YB 22 Edw III, Pasch. Pl. 12, cited by Holdsworth, above, n. 2, at 152.

⁷ *Bankers' case* (1690 – 1700) 14 ST 1.

⁸ See Section 4.4.

the executive. However, the courts did not extend the ordinary principles of liability to the government; instead, they continued to uphold the petition of right as the proper remedy against executive action.

MacBeath v Haldimand appears to have been the first time the court recognised the petition of right as a remedy against the executive government.⁹ The case arose in the newly established British colony of Quebec. The Governor of Quebec had instructed the plaintiff to purchase supplies of necessities “for the use of the Crown”¹⁰ at the post of Michilimackinac. The plaintiff then sued the Governor for his refusal to pay for the total amount of expenditure that the plaintiff incurred in purchasing the supplies. The issue was whether the Governor was the right defendant, given that he had acted as “the agent of Government”.¹¹

At trial, the jury found that there was no case against the Governor. The Court of King’ Bench dismissed the plaintiff’s appeal against the verdict. Lord Mansfield CJ stated in the judgment that the plaintiff “must...apply to Government for a reimbursement”¹² and that he had “no doubt but the Crown will do ample justice to the plaintiff’s demands if they be well founded.”¹³ As an aside, the prescient use of “Crown” to mean the executive government reflects the colonial context of the decision, where the understanding of Crown as an entity distinct from the Sovereign evolved earlier¹⁴ than in the United Kingdom because of the Sovereign’s absence.

It is apparent that the Court in *MacBeath* assumed that the petition of right was the appropriate remedy against the Crown even though it considered the “Crown” to refer to the executive government rather than the Sovereign. The Court did not contemplate the possibility that an ordinary action as between subject and subject could lie between the executive government and

⁹ *MacBeath v Haldimand* (1786) 1 TR 172; 99 Eng. Rep. 1036 at 1036.

¹⁰ At 1037.

¹¹ At 1038.

¹² At 1040.

¹³ At 1041.

¹⁴ See Section 4.5.

the plaintiff. Possibly, the word “Crown” distracted the Court from having to ask whether it was appropriate for the king’s immunity from suit to apply to the executive government. The result was an ill-considered proposition that the remedy against the executive government also lay in grace-and-favour as did a remedy against the Sovereign personally.

The practice of petitioning the Crown in respect of executive action also became prevalent in 19th century England as the sphere of executive action grew.¹⁵ This was because there was no way to claim against the executive collectively apart from petitioning the Crown;¹⁶ the executive had no legal personality except through the concept of the Crown.

However, the process of petitioning was “cumbersome and expensive”:¹⁷ the suppliant had to first present his petition to the Home Secretary for an irrecoverable fee of 10 guineas. If the Home Secretary agreed to the petition, it would then be signed by the Queen and countersigned by the Home Secretary and Lord Chancellor. Afterwards, the suppliant could ask for a Commission which would decide whether he had a just cause to commence proceedings.¹⁸

The process became increasingly unsuited to catering for the rising number of contractual claims against the executive as a result of the government’s dealings with merchants, ship-owners and other contractors.¹⁹ In the 1850s, a number of Australian colonies simplified the process for petitioning in order to make the colonial governments a more appealing trading partner for private contractors.²⁰ The English Parliament followed suit by enacting the Petitions of Right Act 1860.

¹⁵ Holdsworth, above n. 2, at 290.

¹⁶ See discussion of *Sloman v Governor and Government of New Zealand* (1876) 1 CPD 563 in Section 4.5.2.2.

¹⁷ (26 January 1860) 156 GBPD (Series 3) HC 161.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Claimants’ Relief Act 1853 (SA); Claims against the Government Act 1857 (NSW); Claims against the Crown Act 1858 (Vic); see PW Hogg “Victoria’s Crown Proceedings Act” [1970] Melb. U. L. Rev. 342.

The Petitions of Right Act allowed a suppliant to place before a court a petition addressed to the Queen.²¹ The court forwarded the petition to the Secretary of State for the Home Department “in order that [the petition] may be submitted...for Her Majesty’s gracious consideration and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done.”²² Once fiat was obtained, the Home Secretary would send a copy of the petition and fiat to the office of the Solicitor to the Treasury. Within 28 days of this, the Solicitor to the Treasury had to forward the petition to the relevant department²³ and the relevant department had to answer, plead or demur to the petition.²⁴ The matter then proceeded like a regular hearing at the court where the petition had originally been filed.²⁵

Petitions of right proved to be a reasonably satisfactory remedy against the executive government.²⁶ Initially, it allowed only claims the recovery of real and personal property.²⁷ In *Thomas v R*, the Court of Queen’s Bench also accepted that petitions of right could lie against the Crown in contract.²⁸

However, there were two shortcomings. First, the Petitions of Right Act did not allow claims in tort. This is discussed in Section 7.2.2 below. Secondly, the Act stifled any opportunity for the Crown qua executive to distance itself from the grace-and-favour approach to executive accountability for damage. The assumption underpinning the Act was that the Queen’s permission was necessary to obtain a remedy against the executive. In practice, the Home Secretary first obtained the opinion of the relevant government department in respect of whose

²¹ Petitions of Right Act 1860, s 1.

²² At s 2.

²³ At s 3.

²⁴ At s 4.

²⁵ At s 3.

²⁶ At s 5.

²⁷ See Tom Cornford “Legal remedies against the Crown and its officers before and after *M*” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 233 at 236; Glanville Williams *Crown proceedings: an account of civil proceedings by and against the Crown as affected by the Crown Proceedings Act, 1947* (Stevens, London, 1948) at 2-3.

²⁸ *Thomas v R* (1874) LR 10 QB 31.

action the petition before advising the Sovereign on whether or not fiat should be granted.²⁹ It was not open to the Home Secretary “to refuse capriciously” to recommend a granting of fiat to Her Majesty;³⁰ however, the suppliant did not have any remedy in cases where the Home Secretary did refuse.³¹ Laski described the petition of right as an “an ungracious effort to do justice without the admission of a legal claim.”³² This would remain the legal position until the Crown Proceedings Act 1947 (UK) abolished the petition of right and allowed individuals to bring actions against the Crown as of right.

7.2.2. Immunity from tortious liability

The petition of right did not lie against the Crown in tort – a result of the maxim “the king can do no wrong”. Consequently, government revenue was out of reach for the purposes of damages in tort.

The Crown’s immunity from tortious liability emerged from a trio of 19th century decisions – *Viscount Canterbury v Attorney-General*,³³ *Tobin v R*³⁴ and *Feather v R*.³⁵ These three decisions warrant a close examination because their incremental logic illustrates the fallacious extension of the Sovereign’s immunity in tort to the Crown.

7.2.2.1. *Viscount Canterbury v Attorney-General*

Viscount Canterbury appears to have been the first time that a person had attempted to claim damages from “the Crown” in response to the alleged negligence of the Crown’s servants in

²⁹ Walter Clode *The law and practice of petition of right under the Petitions of Right Act, 1860* (William Clowes and Sons Limited, London, 1887) at 163.

³⁰ *Ryes v Duke of Wellington* 9 Beavan, 479; 14 LJ Ch 461; 10 Jur. 167, quoted by Clode, above n. 27, at 164.

³¹ See *Irwin v Grey* 3 F&F 635, cited in Clode, above n. 27, at 164; see also *R v Inland Revenue Commissioners, In Re Nathan* (1884) 12 QBD 461 at 479, where the Court described it as “a constitutional duty of the Attorney-General” to allow all but frivolous claims to proceed.

³² Harold J Laski “The responsibility of the State in England” (1919) 32(5) Harv L. Rev. 447 at 455.

³³ *Viscount Canterbury v Attorney-General* (1842) 1 PH 307; 41 Eng. Rep. 648.

³⁴ *Tobin v R* (1864) 16 CB (NS) 310; 143 Eng. Rep. 1148.

³⁵ *Feather v R* (1865) 6 B&B 257; 122 Eng. Rep. 1191.

matters unconnected to an interest in land.³⁶ The facts were as follows: the Speaker of the House of Commons, Lord Canterbury, lodged a petition of right alleging that the servants of the Commissioners of Woods and Forests had negligently caused a fire that had damaged his property, and that the Crown was liable because the Commissioners were servants of the Crown.³⁷ The Attorney-General appeared for the Crown. The House of Lords declined the petition on the basis that the Crown could not be liable for the tortious actions of its servants.³⁸ Lord Lyndhurst said that “a difficulty” with the petition was that no proceeding could be maintained “for the personal negligence of the Sovereign”.³⁹ Accordingly, there could be no ground for supporting a proceeding for the acts of the agent or servant.⁴⁰ His Lordship also doubted that Queen Victoria could be liable for an event which had occurred during the reign of William IV.⁴¹

The influence on this judgment of the maxim “the king can do no wrong” is clear, although Lord Lyndhurst did not expressly refer to the maxim. Lord Lyndhurst’s reasoning centred on the proposition that the monarch could not be liable for a servant’s negligence when no proceeding in negligence could be maintained against the monarch personally.

However, McLean contends that *Viscount Canterbury* is not authority for the principle that the Crown is not vicariously liable for its servants’ torts; later cases and commentary have incorrectly interpreted it as such.⁴² She argues that the machinery of government had not become adequately centralised in 1842 to justify a finding that the Crown should be liable for the actions of the Commissioners’ servants. McLean points out that the Commissioners had separate funds that were not owing to parliamentary appropriation, and that early Victorians regarded such

³⁶ See discussion of the history of petitions of right in *Tobin*, above n. 34, at 1165 – 1170.

³⁷ *Canterbury*, above n. 33, at 648 – 649.

³⁸ At 654.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ At 654 – 655.

⁴² Janet McLean *Searching for the State in British Legal Thought* (Cambridge University Press, New York, 2012) at 219 – 220.

public offices as personal property as opposed to a duty arising from a master-servant relationship with the Crown.⁴³

It is submitted that McLean is correct: *Viscount Canterbury* did not suggest that the Crown could not be liable for the torts of the executive government. Throughout the judgment, Lord Lyndhurst LC treated the Crown as a synonym for the sovereign. His Lordship used “the Crown” and “the Sovereign” and “Her Majesty” interchangeably.⁴⁴ There was no recognition that the Crown could be a symbol for the executive in abstract. Accordingly, the maxim “the king can do no wrong” remained confined to the Sovereign personally. It was not until *Tobin*⁴⁵ and *Feather*⁴⁶ that the maxim would extend to the executive government.

7.2.2.2. *Tobin v R*

Tobin v R came before the Court of Common Pleas three years after the Petitions of Right Act 1860. The facts of *Tobin* were that a Commander of the Royal Navy, who had been employed to fight slave trade on the African coast, mistook a schooner to have been engaged in slave trade and ordered its destruction. The owner of the schooner petitioned the Crown for damages in tort.⁴⁷ The Court declined to find the Crown liable on three grounds: first, that the Commander was not acting in obedience to the Crown’s command but performing a duty imposed by statute;⁴⁸ secondly, that even if he were an agent of the Crown, he stepped outside the scope of his agency when he seized a ship not engaged in slave trade and thereby exempted his principal from liability;⁴⁹ and thirdly, that a petition of right could not lie for unliquidated damages for a trespass.⁵⁰

⁴³ At 217 – 219.

⁴⁴ *Canterbury*, above n. 33, at 654 – 656.

⁴⁵ *Tobin*, above n. 34.

⁴⁶ *Feather*, above n. 35.

⁴⁷ *Tobin*, above n. 34, at 1162.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

The third ground is of main interest to this section, although a brief comment on the first two grounds is appropriate. The first ground indicated that courts did not view an officer acting under a statutory duty as acting for the Crown, notwithstanding the fact that the officer was still acting on behalf of the executive government. This distinction echoes the *persona designata* analysis that is discussed in Chapter 8 below. The second ground, that the Crown could not be liable as a principal because the actual wrong was outside the scope of the agency, was a standard application of the principle of agency at the time.⁵¹ It was not an interpretation unique to government liability.

Erle CJ relied on the maxim “the king can do no wrong” in support of the third ground that no petition of right lay against the Crown for unliquidated damages in trespass.⁵² His Honour pointed to the fact that no petition had been granted for damages in tort throughout the history of the petition of right, unless the tort was in relation to land.⁵³ His Honour drew support for this proposition from Coke’s statement that “whatever is exceptionable in the conduct of public affairs is not to be imputed to the king.”⁵⁴ Erle CJ reasoned:⁵⁵

[T]he King...is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command.

It is remarkable that Erle CJ thought that allowing a petition of right would amount to a finding that the monarch had commanded a wrong. As already stated in Section 4.4.3, the word “Crown” had become the prevalent way of referring to the executive in statutes and in official language

⁵¹ At 1163, Erle CJ describes this “general rule” as “not disputed”; see also McLean, above n. 42, at 220.

⁵² At 1164 – 1165.

⁵³ At 1167.

⁵⁴ At 1165.

⁵⁵ Ibid.

by the 1860s, so that there was little reason to believe that a reference to the Crown was a reference to the monarch personally.⁵⁶

Moreover, the Petitions of Right Act 1860 had clearly distinguished between petitions pertaining to the Crown qua executive and petitions relating to the monarch's own actions. Section 14 of the Act provided that any sum awarded in "public matters" must be paid out of money that the Commissioners of the Treasury held at the time being or that Parliament subsequently allocated for the purpose. This was in contrast to judgments against "any private property of...Her Majesty", for which a certificate had to be sent to the "Office of the Treasurer of Her Majesty's Household" to enable Her Majesty to pay the suppliant the amount to which the suppliant was entitled. The fact that the Act separately addressed the monarch's personal liability should have alerted the Court in *Tobin* that a finding of executive liability could not have reflected on the monarch personally.

It is therefore difficult to justify the Court's finding that the maxim "the king can do no wrong" exempted the Crown from liability for the tortious actions of government officers. *Tobin's* effect was to broaden the application of the maxim compared to *Viscount Canterbury*, which had only held that the Sovereign could not be personally liable in tort.

7.2.2.3. *Feather v R*

Feather v R went even further than *Tobin*: it accepted outright that the executive enjoyed the monarch's immunity in tort. The case came before the Queen's Bench when a patentee lodged a petition of right, alleging that the Admiralty had wrongfully failed to pay him for the use of his invention.⁵⁷ Two issues lay before the Court: first, was the Crown bound to seek the patentee's assent to use the invention,⁵⁸ and secondly, if the Crown's use of the invention amounted to a

⁵⁶ McLean, above n. 42, at 140.

⁵⁷ *Feather*, above n. 35, at 1201.

⁵⁸ *Ibid.*

tort, did a petition of right lie against the Crown?⁵⁹ In relation to the first issue, the Court held that grants from the Crown are not to be seen as derogating from the Crown's prerogative in any way unless it is expressly stated in the grant.⁶⁰ This meant that the Crown reserved a right to use a patent without the patentee's consent as a matter of law.

Accordingly, the Court did not need to address the second issue. It chose nonetheless to do so.⁶¹ At the hearing, Cockburn CJ had referred to the maxim "the Sovereign cannot commit a wrong." To this, counsel for the patentee had replied, "That is personally, but the Crown has to answer for many acts of its officers."⁶² In light of this exchange, there can be no doubt that the Court was aware of the argument that the maxim should only apply to the Crown qua Sovereign but not to the Crown qua executive. However, the Court rejected this argument. Cockburn CJ, who delivered the Court's unanimous judgment, ruled:⁶³

[T]he maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign...It follows that a petition of right which complains of a tortious act done by the Crown or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress.

This statement was as yet the most explicit recognition that the maxim "the king can do no wrong" prevented the petition of right from lying against a tort committed by the executive government. The Court openly acknowledged that the maxim applied to the Sovereign in not only her personal but also political capacity. In other words, it did not matter that the Sovereign had no role to play in the Admiralty's decision to use the patent without paying royalties and so no

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ At 1204.

⁶² At 1199.

⁶³ At 1205.

wrong could have been imputed to the Sovereign personally. The fact that the Sovereign embodied the executive in her political capacity meant that no wrong could be imputed to the executive. This was a significant expansion of the immunity compared to the time that it applied to the Sovereign personally. The expansion did not take into account that the Sovereign and the executive were now politically distinct had different functions.

7.3. Untenable policy justifications

The Crown's immunities from suit and in tort had little policy justification from the outset. English courts and Parliament advanced several reasons why the Crown could not be sued nor be subject to petition of right in tort. One proffered reason was that allowing damages against the Crown would be at odds with the need for parliamentary appropriation of Crown expenditure.⁶⁴ Another was that the liability of servants of the Crown in tort made it unnecessary for a petition of right to lie against the Crown directly.⁶⁵ A third reason was that removing the immunities would lead to vexatious litigation against the executive.⁶⁶ An examination of these reasons reveals that none were tenable in the 19th century context. On the contrary, it was standard government practice to compensate claimants informally.⁶⁷ This belied a political understanding that the executive government did not merit the Sovereign's immunity.

7.3.1. The need for parliamentary appropriation

One of the reasons why the courts in *MacBeath* declined to allow damages against the Crown was that Parliament, not the Crown, held the reins to public expenditure.⁶⁸ Mansfield CJ observed that:⁶⁹

⁶⁴ See Section 7.3.1.

⁶⁵ See Section 7.3.2.

⁶⁶ See Section 7.3.3.

⁶⁷ See Section 7.3.4.

⁶⁸ *MacBeath*, above n. 9, at 1038.

⁶⁹ *Ibid.*

[G]reat difference had arisen since the Revolution, with respect to the expenditure of public money. Before that period, all the public supplies were given to the King, who...alone had the disposition of the public money. But since that time, the supplies have been appropriated by Parliament to particular purposes, and now whosoever advances money for the public service trusts to the faith of Parliament....[A]t any rate, if there were a remedy against the Crown, application must be made to Parliament and it would come under the head of supplies for the year.

This reasoning overlooks the fact that the court's order would have lain against the Crown, not Parliament. Whether or not Parliament would allow the Crown to honour its debt was up to Parliament. Deference to Parliament therefore did not warrant turning what would otherwise be a right to sue for damages to a petition reliant on grace and favour.

In *Viscount Canterbury*, the Court upheld a variation of the argument in *MacBeath* that the evolution of the Civil List had wrested the Crown of any liability for damages.⁷⁰ The Attorney-General successfully submitted for the Crown that:⁷¹

surrender made by the Crown, at the very beginning of every reign, of its hereditary revenues, in consideration of a Parliamentary appropriation for the expenses of the civil list, without any provision being made for the satisfaction of claims of this description, had not only divested the Crown of any fund upon which a judgment in the nature of damages could be enforced, but was itself a strong circumstance to shew that the law recognised no such liability in the Crown as was sought to be enforced by this petition.

The Attorney-General's submission was flawed because the Civil List was irrelevant to the damages awarded against the Crown. After 1830, the Civil List only defrayed the expenses of the Royal Household; all costs associated with civil government – including the pay of government

⁷⁰ *Canterbury*, above n. 33, at 655.

⁷¹ At 650.

employees – rested with Parliament.⁷² It did not matter that Parliament had not provided funds for damages in the Civil List; an order for damages against the Crown in respect of the Commissioners' servants would have rested with the Crown as part of the expenses of civil government until Parliament provided funds for that purpose.

In any case, the concern about parliamentary appropriation could not have survived the Petitions of Right Act 1860. Section 14 of the Act provided that judgments against the Crown qua executive would be honoured at a later date through parliamentary appropriation if there were insufficient funds in the Treasury at the time of the judgment:

It shall be lawful for the commissioners of Her Majesty's treasury and they are hereby required to pay the amount of any moneys and costs as to which a judgment or decree, rule or order, shall be given or made that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule or order, the tenor and purport shall have been so certified to them as aforesaid, out of any moneys in their hands for the time being legally applicable thereto, or which may hereafter voted by parliament for that purpose, provided such petition shall relate to any public matter...

The requirement of parliamentary appropriation for Crown expenditure could therefore no longer justify the perpetuation of the petition of right or the Crown's immunity in tort after 1860, even if one were to accept for the sake of argument that the courts in *MacBeath* and *Viscount Canterbury* were correct.

7.3.2. The non-immunity of servants

A second refrain that courts commonly used to justify Crown immunity in tort was that subjects still had a remedy against the servant who had committed the wrong. This was a reference to the principle that servants were not immune for wrongs committed while acting under the order of the king. In *Tobin*, the Court quoted with approval an older judgment which held that "[t]he civil

⁷² Vernon Bogdanor *The monarchy and the constitution* (Oxford University Press, Oxford, 1995) at 184.

irresponsibility of the supreme power for tortious acts could not be maintained with any shew of justice, if its agents were not personally responsible for them.⁷³ Likewise, the Court in *Feather* stated that “no authority [was] needed to establish that a servant of the Crown [was] responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown.”⁷⁴

These platitudes ignored the reality that the 19th century executive government was capable of committing wrongs in ways where suing an individual officer was not an adequate or appropriate remedy. For one thing, the extent of damage could have easily exceeded the financial capacity of an individual officer. The barring of access to public funds would, in many cases, have limited the plaintiff’s recovery to a fraction of the full loss.

Secondly, justifying the Crown’s immunity with reference to its servants’ non-immunity ignored the executive’s capacity for institutional wrongdoing – what McLean describes as a “collective will to do wrong”.⁷⁵ Barker sardonically likened the English State to “a bundle of officials, individually responsible for their acts, and only united by a mysterious Crown.”⁷⁶

The reality was that officers who committed a tort were a part of the larger apparatus of executive government. Their tort was the end-result of a system of administrative hierarchy and systematised decision-making. It was unjust to pin liability on the individual alone. Laski would later eloquently sum up the issue:⁷⁷

Our English state finds its working embodiment in the Crown; but if we choose to look beneath that noble ornament we shall see vast government offices full of human, and therefore, fallible men. We choose to ignore them; or rather, we know them only to make them pay for errors

⁷³ *Tobin*, above n. 34, at 1167; citing *Rogers v Rajendro Dutt* 13 Moore PC 207, 236.

⁷⁴ *Feather*, above n. 35, at 1205-6.

⁷⁵ McLean, above n. 42, at 222.

⁷⁶ Ernest Barker “The Discredited State: Thoughts on Politics before the War” (1915) 5 *Political Quarterly* 101 at 101.

⁷⁷ Laski, above n. 32, at 451.

they have not committed on their own behalf. So do we offer vicarious victims for a state that hides itself beneath an obsolete prerogative.

English law paid lip service to the notion of institutional liability in the common law rule that superior officers could not be vicariously liable for the actions of subordinates because both the superior and subordinate officers were fellow-servants of the Crown.⁷⁸ It would appear from this rule that the Crown, as master, should be as the ultimate repository of liability for the actions of all servants. However, the maxim “the king can do no wrong” meant that the Crown was not liable either.

7.3.3. Vexatious litigation

A third reason for the resistance to petitions of right in tort was the concern that it would open the floodgates for vexatious claims. Parliamentary reports leading up to the Petitions of Right Act 1860 show that the House of Commons had turned its mind to the possibility of removing the fiat but decided against it on the basis that it would deprive the government of the ability to reject “frivolous and vexatious proceedings on the part of the subjects.”⁷⁹ The same concern influenced the Court in *Tobin* to retain the Sovereign’s immunity from tort. Erle CJ commented:⁸⁰

To these reasons and authorities [concerning the Sovereign’s immunity in tort] we would add our opinion that there is good ground for maintaining that which we find to be the law on this subject. If each of the Queen’s subjects who believed he had been at any time, in any reign, wronged in the administration of civil or military affairs, could sue the Sovereign for the time being for the amount at which he might estimate his damage, the extent of pernicious result would be great.

⁷⁸ *Bainbridge v Postmaster-General* [1906] 1 KB 178 at 189.

⁷⁹ (3 February 1860) 156 GBPD (Series 3) HC 547; quoted by Geoff McLay “The problem with suing Sovereigns” (2010) 41 VULWLR 403 at 407.

⁸⁰ *Tobin*, above n. 34, at 1170.

The concern was understandable. The unprecedented scale at which the executive was operating meant that large numbers of lawsuits would be inevitable – some meritorious, some vexatious. Retaining the requirement of fiat was a convenient safeguard against this concern; preventing petitions of right in tort was also one. The extension of the Sovereign’s immunities to the Crown qua executive had a modern functional purpose.

However, there were two issues with retaining the requirement of fiat. First, it denied claimants a right to sue and made their claims a matter of grace-and-favour. Secondly, there was no rational connection between the maxim “the Sovereign can do no wrong” and the objective of preventing vexatious litigation against the executive. It was duplicitous to use the maxim for this objective. A more transparent approach would have been for Parliament to expressly provide against vexatious litigation when creating provisions for bringing claims against the government. The concept was not unknown in 1860: a Vexatious Litigation Prevention Bill had even made its way to the Second Reading in 1857.⁸¹ The perpetuation of the Sovereign’s immunities from suit and in tort was a disproportionate safeguard against vexatious litigation because it also made meritorious claims subject to grace-and-favour.

7.3.4. Divergent law and practice

The Crown’s immunity in tort starkly contrasted with the government practice. The executive government typically compensated claimants who had suffered a legal wrong and stood behind tortfeasors.⁸² This section argues that the government practice belied an understanding that the Crown qua executive did not have a justifiable claim to the Sovereign’s immunity in tort.

McLay cautions against “basing conclusions as to what happened” in cases concerning government liability “by reference to the accounts in the law reports”.⁸³ He refers to multiple

⁸¹ (25 June 1857) 146 GBPD (Series 3) HL 338 – 342.

⁸² Williams, above n. 27, at 17; McLay, above n. 79, at 418.

⁸³ At 418 - 419.

19th century proceedings where the plaintiff failed to establish a valid legal claim against the Crown but nonetheless reached settlement with the government. In *Tobin*, the Admiralty settled with the owner of the schooner that the Commander of the Royal Navy had accidentally sunk. McLay writes that the Admiralty had always intended to settle in respect; it only objected to the legal action because “[w]hile it was prepared to stand behind [the tortfeasor officer] in the legal actions against him, it preferred that such an obligation not be recognised by the court by allowing a suit directly against him.”⁸⁴ According to the law reports, however, *Tobin* is authority for the principle that the Crown is not vicariously liable in tort because the King cannot even command a wrong.⁸⁵

Another illustration of the gap between the legal position and government practice is the proceeding in *Sloman v the Governor and Government of New Zealand*.⁸⁶ The plaintiff brought an action against the Governor and Government of New Zealand for breach of contract after the colonial government reneged on an agreement to pay passage money to the plaintiff for emigrating German nationals to New Zealand. The English Court of Appeal refused to entertain the claim because the contract was between the plaintiff and the Queen and the plaintiff had instead brought an action against the Governor and Government of New Zealand, who had no legal personality to be sued. James LJ had famously asked “What is the thing called the Governor and government of the colony of New Zealand?”⁸⁷ His Honour denied that there was any “body politic residing in England...called the Governor and government of the colony of New Zealand...”⁸⁸ Notwithstanding this legal position, the colonial government paid compensation for the plaintiff’s wasted costs and a share of the loss of profit. Government memoranda of the time establish that the government was aware of the need to “deal with [the plaintiff] justly” and not

⁸⁴ At 419.

⁸⁵ See Section 7.2.2.2 above.

⁸⁶ *Sloman*, above n. 16; see also discussion of *Sloman* in Section 4.5.2.2.

⁸⁷ At 565.

⁸⁸ *Ibid*.

“take advantage of technical points to defeat any equitable claim” by the plaintiff.⁸⁹ The Crown’s exalted position at law does not appear to have had much bearing on the government’s understanding of its practical obligations.

Early 20th century government also informally accepted government responsibility for the actions of its officers.⁹⁰ It became an informal practice for the executive government to appoint a nominal defendant in tort proceedings to allow claimants to circumvent the bar against bringing a petition of right in tort. Glanville Williams describes the practice as follows:⁹¹

The servant of the Crown who committed the tort was personally liable, and if the Crown regarded the case as a proper one for it to assume responsibility, it would endeavour to reach a settlement with the plaintiff and, if that failed, would “stand behind” the wrongdoing servant by defending the action on his behalf, and, if he lost, paying the damages and costs. This procedure in many cases gave the injured plaintiff substantial satisfaction.

The Crown’s immunity from tort received sharp criticism in a memorandum prepared by the Treasury Solicitor, Sir John Mellor, between 1919 and 1921.⁹² The Mellor Memorandum attributed the immunity to “sentiments of respect for the person and dignity of the Sovereign.”⁹³ It considered the immunity outdated:⁹⁴

[The] rule dates from times when the Sovereign was far more closely associated with executive functions than is now the case, and these functions have, in the hands of administrative

⁸⁹ Letter from J Vogel (Prime Minister of New Zealand) to H Atkinson (Minister for Immigration) regarding compensation for Sloman and another (3 May 1875), Enclosure 1; quoted by McLay, above n. 79, at 419 – 420.

⁹⁰ Joseph Jacob “The debates behind an Act: Crown proceedings reform 1920 – 1947” (1992) 3 Public Law 452 at 455.

⁹¹ Williams, above n. 27, at 17.

⁹² John Mellor *Memorandum* (LCO2/1094(1), 1921) [“Mellor Memorandum”]; cited in Joseph Jacob *The Republican Crown* (Dartmouth, Aldershot, 1996) at 64 – 82.

⁹³ Mellor Memorandum, above n. 92, at 64, quoted by Jacob, above n. 92, at 72.

⁹⁴ *Ibid.*

Departments of State, developed a greatly extended scope and are concerned with numerous matters of a class with which the Crown in former times had little or nothing to do.

Mellor also questioned whether the Crown's immunities were of benefit to the Crown itself:⁹⁵

[I]t is questionable whether the advantages which [the Crown] may derive from its immunities are not seriously discounted by the prejudice which these excite in the Courts and among the public and there is grave doubt whether in the long run the Crown is the gainer.

The Mellor Memorandum shows that the English government already appreciated by the early 1920s that the Crown's immunities had no place in 20th century political reality. Admittedly, there were opposing views within the government but there was considerable support for the position in the Mellor memorandum.⁹⁶ By contrast, the legal position remained that the Crown was not liable for the wrongs of the executive government.

7.4. The contrasting position in colonies

Colonial statutes and case law recognised far more clearly than contemporary English law that the executive's functions did not warrant the Sovereign's immunities in suit and tort. The reasons were twofold: first, the maxim that the king could do no wrong held far less sway in the colonies given that the monarch was an "absentee monarch"⁹⁷. Secondly, the pioneering conditions of the colonies compelled colonial governments to undertake many enterprises that would be seen as "private" enterprises in the United Kingdom. It was difficult to justify why the Crown should be immune in respect of the same actions for which a private body would be liable. This section discusses the legislative reforms in Australia and New Zealand that made the Crown suable and liable in tort. It also analyses two 19th century New Zealand decisions that appear to recognise direct and institutional executive liability. The discussion lays the groundwork for the later

⁹⁵ Mellor Memorandum, above n. 92, at 1, quoted by Jacob, above n. 92, at 66.

⁹⁶ Jacob, above n. 90, at 459.

⁹⁷ Cheryl Saunders "The concept of the Crown" [2015] 38 Melb. U. L. Rev. 873 at 883.

argument that the Crown Proceedings Act 1950 was a regressive development in New Zealand law.

7.4.1. Legislative reforms

Australian colonies began to abolish Crown immunity from suit from the 1850s. South Australia, New South Wales, Victoria, Queensland and Tasmania each enacted legislation to make suits against the government as of right.⁹⁸ These statutes retained the expression “petition of right” to refer to proceedings against the Crown but removed the requirement of royal fiat.⁹⁹ The form of the proceeding that followed a petition varied between the colonies. New South Wales, Queensland and South Australia required the Governor to appoint a nominal defendant upon the presentation of a petition.¹⁰⁰ The device of a nominal defendant preserved the theoretical position that proceedings against the Crown would offend the monarch’s dignity. By contrast, the Victorian statute allowed proceedings against the Crown itself.¹⁰¹ It was therefore the first of the colonies to dispense with the fiction that the government of the colony had any claim to the monarch’s dignity.

Queensland was the first to remove the immunity in tort with the enactment of the Claims against the Government Act 1866. The Act did not limit the “claims” that could be brought against the government and thereby created a basis for claims in tort.¹⁰² A decade later, New South Wales followed the example of Queensland and enacted the Claims against the Government Act 1876. The need to treat the government and private individuals on an equal footing featured heavily in the parliamentary debates behind these legislative reforms.¹⁰³ For example, the proponents of the Queensland bill asserted that the bill raised “no question of infringing the

⁹⁸ Claimants’ Relief Act 1853 (SA); Claims against the Government Act 1857 (NSW); Claims against the Crown Act 1858 (Vic); Claims against Government Act 1866 (Qld); Crown Redress Act 1891 (Tas).

⁹⁹ See Hogg, above n. 20, at 342 – 343.

¹⁰⁰ At 342.

¹⁰¹ At 342 – 343.

¹⁰² P D Finn “Claims against the government legislation” in P D Finn (ed) *Essays on Law and Government Volume 2 – The citizen and the State in the courts* (LBC Information Services, New South Wales, 1996) 25 at 27.

¹⁰³ At 27 – 32.

dignity of the Crown”,¹⁰⁴ and was only intended to remove the government’s ability to rely on “an immunity which no private individual in the community possessed.”¹⁰⁵

New Zealand reforms had a slower start. Until 1877, the framework for Crown liability in New Zealand emulated the contemporary English legal framework.¹⁰⁶ The Crown Redress Act 1871 was similar in scope to the Petitions of Right Act 1860 (UK) and enabled any person to bring a petition before the Supreme Court to enforce claims for breach of contract¹⁰⁷ against the Crown “as between subject and subject”.¹⁰⁸

The need for reform became apparent after a series of accidents occurred in connection with public works undertaken by the government. The Hon. John Hall MP, later Premier of New Zealand, brought to the House’s attention the damage caused by government-owned railways.¹⁰⁹ In one instance, a passenger travelling from Ashburton to Hinds had been forcibly removed by a railway guard who had forgotten that he had clipped his ticket, resulting in the passenger having to make the journey without his luggage on a wagon and six horses and reaching his destination two days late. In another case, sparks from a passing railway engine set fire on a shed in Christchurch. In both cases, the aggrieved person was left without a legal remedy because there was no legal avenue for suing the Crown in tort. The Honourable MP said that:¹¹⁰

He could not believe that when it was proposed to intrust the construction and management of railways in New Zealand to the Colonial Government, it was intended to deprive the community at large of the ordinary redress which was afforded in all other cases of this kind.

¹⁰⁴ At 27, quoting Lilley MLA in (1865) 2 *Queensland Parliamentary Debates* 341.

¹⁰⁵ At 27, quoting Douglas MLA 2 *Queensland Parliamentary Debates* 345.

¹⁰⁶ A. E. Currie *Crown and Subject* (Legal Publications Ltd, Wellington, 1953) at 4-5.

¹⁰⁷ Crown Redress Act 1871, s 9.

¹⁰⁸ At ss 2 and 3.

¹⁰⁹ (23 October 1877) 26 NZPD 417.

¹¹⁰ *Ibid.*

The resulting Crown Redress Act 1877 catapulted New Zealand law ahead of English law. Section 2 removed the requirement of fiat, albeit it retained the term “petition of right” for a claim. Section 3 expanded the liability of the Crown to “claims or demand...aris[ing] out of some contract, act, deed, matter, or thing done, executed, or entered into by or under the authority express or implied of Her Majesty’s local Government in New Zealand, or for which the said local Government would be responsible if they were private subjects of Her Majesty in New Zealand.” The reference to “act, deed, matter or thing done” enabled the Act to cover damage in the absence of a contractual relationship. The Supreme Court in *Mercer v R* interpreted s 3 as including actions in tort.¹¹¹

Next came the Crown Suits Act 1881. It expressly allowed petitions of right in torts inflicted in the course of public works.¹¹² The parliamentary debates behind the Act show no trace of deference towards the Crown; rather, they reveal a political understanding that the government and public should be on an equal footing in litigation. The Hon. Mr. Waterhouse, MP, stated that “there was no reason why, in these matters [of tortious liability], the Government should be in a different position from other parties.”¹¹³ The Hon. Mr Williamson, MP, contended that “if the Government did not do that which it forced every individual and private company to do”, it “should be responsible for any accidents that might happen.”¹¹⁴ The Crown Suits Act 1908 consolidated the 1881 Act with “trifling changes as to style but none as to substance.”¹¹⁵

¹¹¹ *Mercer v R* CA (3 June 1881), unreported, cited in *Williams v R* (1882) 1 NZLR (CA) 222 at 227, *per* Johnston J [“Court of Appeal decision in *Williams*”]; for a discussion of the facts of *Mercer*, see Stuart Anderson “‘Grave injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009) 12(1) Otago L. Rev. 1 at 12.

¹¹² Crown Suits Act 1881, s 37(2).

¹¹³ (9 September 1881) 40 NZPD 479.

¹¹⁴ (9 September 1881) 40 NZPD 480.

¹¹⁵ Anderson, above n. 111, at 15.

Calls for substantive reform grew in the face of an increase in accidents as a result of the growth in the government's commercial enterprises since the late 19th century.¹¹⁶ Commercial enterprises were not "public works" and therefore, individuals who suffered damage as a result of these enterprises could not lodge a claim under s 37(2) of the Crown Suits Act 1881. Occasionally, the government consented to waive the legal point that a claim did not concern a "public work";¹¹⁷ however, at other times, the government refused to do so.¹¹⁸ Two instances where the government argued that the injury did not result out of "public works" involved a claim of nuisance against the State Coal Department by the Farmers' Union¹¹⁹ and a claim for negligence against the State Coal Department when a coal lorry ran over the claimant.¹²⁰ The executive initially resisted the Opposition's calls for reform out of a concern about opening floodgates for litigation; however, adverse media coverage ultimately forced legislative reform.¹²¹

The Crown Suits (Amendment) Act 1910 removed the restriction that petitions in tort must be connected to public works. The 1910 Act made the Crown liable for "any wrong or injury which is independent of contract and for which an action in damages would lie if the defendant was a subject of His Majesty".¹²² However, the executive insisted on including several exceptions from tortious liability, namely for assault, false imprisonment, malicious prosecution, erroneous judicial process, libel, slander and "any cause of action requiring a malicious motive."¹²³ This Act remained the statutory framework for government liability until 1950.

7.4.2. Judicial recognition of direct liability

¹¹⁶ William Reeves *The Long White Cloud – Ao Tea Roa* (Viking, Victoria, 1987) at 237, 282 – 283; Michael Bassett *The State in New Zealand 1840 – 1984: socialism without doctrines?* (e-book ed, Auckland University Press, Auckland, 2013) at 21 – 22.

¹¹⁷ (15 October 1909) 148 NZPD 229; 236 – 237.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ At 237; see also Anderson, above n. 111, at 15 – 16.

¹²¹ At 16.

¹²² Crown Suits (Amendment) Act 1910, s 3(c).

¹²³ At s 4.

The removal of the Crown's immunity in tort in 1877 removed the need to distinguish between the Crown and its officers for the purposes of tortious liability. Officers did not have to be personally liable; the Crown itself could be directly liable. This also enabled the courts to hold the Crown liable for systematic failures – a position that, it will be seen below, is no longer possible under the Crown Proceedings Act 1950.¹²⁴ Two cases from the 1880s, *Williams v R*¹²⁵ and *Dawson v R*,¹²⁶ illustrate the judicial recognition of direct liability.

7.4.2.1. *Williams v R*

The facts of *Williams v R* were as follow: the plaintiff owned a ship that sunk at Westport Harbour on 17 February 1882 as a result of striking a snag.¹²⁷ The executive had the control and management of Westport Harbour.¹²⁸ The harbour master knew of the snag and had, on 27 January 1882, written to the Secretary of the Marine Department asking for his opinion on whether the snag should be blasted.¹²⁹ The Secretary replied on 9 February 1882, advising that the snag should be cut off by two feet and not blasted.¹³⁰ The harbour master wrote back on 14 February, noting that a diver could not be sent down because the diving dress had been returned to Wellington, and there was no other satisfactory way to remove the snag. He wanted “something done as soon as possible towards removing this danger”.¹³¹ Before he received a reply, the plaintiff's ship struck the snag and sunk. The plaintiff sued the Crown for negligence under s 37 of the Crown Suits Act 1881.

Section 37 of the Act provided:

¹²⁴ See Section 7.5.2.

¹²⁵ Court of Appeal decision in *Williams* above n. 111; *Williams v R* (1883) 1 NZLR (SC) 217 [“Supreme Court decision in *Williams*”]; *R v Williams* [1884] NZPC 1; 9 AC 418 [“Privy Council decision in *Williams*”].

¹²⁶ *Dawson v R* (1884) 3 NZLR (CA) 1.

¹²⁷ Privy Council decision in *Williams*, above n. 125, at 421.

¹²⁸ At 422 – 423.

¹²⁹ At 428 – 429.

¹³⁰ At 430.

¹³¹ At 431.

No claim or demand shall be made upon or against Her Majesty under this Part of this Act unless the same shall be founded upon and arise out of some one of the causes of action hereinafter mentioned, and for which cause of action a remedy would lie if the person against whom the same could be enforced:

- (1) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of Her Majesty, or of Her Majesty's Executive Government in the colony, whether such authority be express or implied:
- (2) A wrong or damage, independent of contract, done or suffered by or under any such authority as aforesaid, in, upon, or in connection with a public work...

Richmond J found in the plaintiff's favour at the Supreme Court. His Honour stated that had the owner of the wharf been a corporation instead of the Crown, the corporation would have been liable in negligence.¹³² In the Crown's case, his Honour "ha[d] had some difficulty in satisfying [him]self" that s 37 gave rise to liability for wrong or damage for mere omissions and neglect when the provision referred to wrongs or damage "done or suffered by or under authority of the Executive Government."¹³³ However, his Honour concluded that "it ought to be so construed."¹³⁴

Significantly, Richmond J's language indicates that he found the executive as a whole to have breached the duty of care. His Honour did not dwell on whether that individual officers such as the harbour master and Secretary of the Marine Department had been at fault. The basis of liability was that "the Executive Government ha[d] knowingly left undone something which ought to have been done."¹³⁵ The relevant failure was the failure of the system, not that of individual officers. This amounted to an understanding that s 37(2) of the Crown Suits Act made the executive directly liable in tort.

¹³² Court of Appeal decision in *Williams*, above n. 111, at 225.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

The Court of Appeal dismissed the Crown's appeal and upheld Richmond J's decision. However, Johnston and Williams JJ were less comfortable with the concept of the executive's direct liability under s 37(2). Johnston J said:¹³⁶

We must read a 'wrong or damage', not arising out of contract, done or suffered in consequence of something done or omitted under the authority of the Executive Government. If the act was done under the authority of the Government, it is not a wrong. We must then say that the words mean done by a person acting under the authority of Government.

Here, again, was the careful distinction between a fallible servant and an infallible government. It appears that Johnston J was echoing the language in *Tobin* that a command by the Sovereign "cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command..."¹³⁷

Following the Court of Appeal judgment, the Crown applied for a retrial by alleging contributory negligence on the part of the master of the ship. The Supreme Court denied the application.¹³⁸ The Crown then appealed to the Privy Council.¹³⁹

The Privy Council dismissed the appeal. Like Richmond J, their Lordships treated the breach as on the part of the executive government as a whole:¹⁴⁰

[T]he Executive Government, by their servant the harbour-master, had, before this accident, notice of a danger at this spot, such as to make it a want of reasonable care in them not, by their servants, to inquire what the danger was, and to warn a vessel in the position of the plaintiff's vessel of the existence of the danger there.

¹³⁶ Court of Appeal decision in *Williams*, above n. 111, at 227.

¹³⁷ *Tobin*, above n. 34, at 1165.

¹³⁸ Supreme Court decision in *Williams*, above n. 125.

¹³⁹ Privy Council decision in *Williams*, above n. 125.

¹⁴⁰ At 431.

Their Lordships do not appear to have shared the Court of Appeal's concern about the implication in the statutory language that the wrong had been committed under the authority of the executive; rather, their Lordships expressed the breach as "the negligence...to take reasonable care is a wrong done by or under the authority of the Executive Government."¹⁴¹ Once again, this was a recognition of direct liability on the part of the executive.

7.4.2.2. *Dawson v R*

In *Dawson v R*,¹⁴² the suppliant petitioned that his mill was burned down when a passing steam engine owned by the executive government emitted a spark that set fire to the plaintiff's property. He alleged that the government had a duty of care not to have used brown lignite coal, which was more prone to emitting sparks, when bituminous coal was available in the market.¹⁴³

At trial, Williams J directed the jury that "the Government might use brown coal without being guilty of negligence, provided in using it they take such precautions as would render the use of such coal attended with as little risk as would attend the use of bituminous coal."¹⁴⁴ The jury found that the government had been negligent. The Court of Appeal subsequently dismissed the Crown's appeal against the decision. Their Honours each agreed with Williams J's direction to the jury.¹⁴⁵

The direction to the jury is notable because it enabled a finding of liability on the part of the executive without any requirement of fault on any individual officer. It was "the government" as a whole whose negligence is under scrutiny. Once again, the focus was on the failure by the system. This was possible because s 37 of the Crown Suits Act 1881 made the Crown liable for wrongs "done or suffered by or under authority of the Executive Government." This contrasts

¹⁴¹ At 433.

¹⁴² *Dawson*, above n. 126.

¹⁴³ At 2 – 3.

¹⁴⁴ At 13, *per* Johnston, Acting CJ.

¹⁴⁵ At 13, *per* Johnston, Acting CJ; 15, *per* Richmond J; 17, *per* Gillies J.

with the language of s 6(1)(a) of the Crown Proceedings Act 1950, which places the focus squarely on individual wrong-doing by making the Crown liable “in respect of torts committed by its servants or agents.”¹⁴⁶

7.4.2.3. Promising trends

In summary, *Williams* and *Dawson* indicated two promising trends in judicial reasoning compared to contemporary English law and later New Zealand law following the enactment of the Crown Proceedings Act 1950. First, the New Zealand courts treated the Crown qua executive as directly liable in tort. This was evident from the expression “wrong done by or under the authority of the Executive Government” in *Williams*¹⁴⁷ and the reference to “government” being “guilty of negligence” in *Dawson*.¹⁴⁸

Secondly, the courts were comfortable finding the Crown liable in tort for systematic failures (that is, failures at an institutional level) as opposed to for wrongs on the part of an identifiable officer. In neither *Williams* nor *Dawson* did the courts enquire whether the knowledge of the snag or the decision to use lignite coal were attributable to an identifiable officer. Instead, the courts discussed the duty and breach as if they lay on the executive as an institution.

It should be noted that recognition of the Crown’s direct liability in tort was confined to those areas of the law where the Crown Suits Acts had removed Crown immunity in tort. Outside the ambit of the Crown Suits statutes, the case law reaffirmed the English understanding of Crown immunity. In *Freeman v R*,¹⁴⁹ Richmond J refused to find that the Crown was vicariously liable for its servants’ actions in tort when the alleged tort arose outside the scope of public works within the meaning of the Crown Suits Act 1881. His Honour noted:¹⁵⁰

¹⁴⁶ See Section 7.5.2.

¹⁴⁷ Privy Council decision in *Williams*, above n. 125, at 433.

¹⁴⁸ *Dawson*, above n. 126, at 13, *per* Johnston, Acting CJ.

¹⁴⁹ *Freeman v R* (1884) 3 NZLR (SC) 109.

¹⁵⁰ At 115.

No principle can be better established than that the Crown is not at common law responsible for the defaults of its servants; and the relaxation of this principle, by the present statute, can be carried no further than is warranted by the express terms of the statute, or by irresistible inference therefrom.

7.5. The Crown Proceeding Act 1950

The simplicity with which the courts in *Williams* and *Dawson* found the Crown liable in tort contrasts with the obstacles to establishing Crown liability in tort under the Crown Proceedings Act 1950. This section discusses these obstacles and their adverse impact on legal coherence.

7.5.1. Background to the Act

Petitions of right and the practice of informal compensation in tort formed the plinths of executive liability in the United Kingdom until 1946. Reform became unavoidable when the House of Lords rejected the government's practice of appointing nominal defendants in *Adams v Naylor*.¹⁵¹

The facts of *Adams* were as follows:¹⁵² two boys who were playing on a beach accidentally stepped on a mine which exploded, killing one of the boys and maiming the other. The British military had planted the mine in 1941 and had erected an enclosure around it. However, most of the barbed wire and the warning sign had become covered in sand at the time of the accident in August 1942. The injured boy and the administrator of the deceased boy's estate sued the officer who was in control of the minefield for damages. This was with the government's consent, as the government had to appoint a nominal defendant in the absence of an individual officer who was clearly responsible.¹⁵³ The main obstacle to the plaintiffs' action was that liability in tort accrued

¹⁵¹ *Adams v Naylor* [1946] AC 543 (HL).

¹⁵² At 543 - 545.

¹⁵³ *Williams*, above n. 27, at 18 - 19.

in the occupier of the land, who in this case was the Crown. Could the nominated defendant be found personally liable in the knowledge that the Crown would stand behind him?

The House of Lords declined to find that occupier liability could vest in a nominated servant of the Crown. Several of their lordships condemned the artificial practice of appointing a nominal defendant when the real defendant was in fact the Crown.¹⁵⁴ Viscount Simon described it as “misleading” given that the issues at trial were “really issues between the defendant and the Crown.”¹⁵⁵ Lord Uthwatt was particularly critical of this “divorce from reality”.¹⁵⁶ He described the case as “a good example of the shifts to which the Crown is driven by the maintenance of the rule that against the Crown no action for tort will lie.”¹⁵⁷ His Lordship left it to the legislature to initiate reforms.

Shortly after *Adams*, the Court of Appeal in *Royster v Cavey*¹⁵⁸ declined to allow a claim against a nominal defendant on behalf of a government department. The plaintiff in this case was an employee of a munitions factory occupied by the Ministry of Supply. She fell into a trench on factory premises and sought to recover damages in negligence from the occupier of the factory.¹⁵⁹ The Ministry was the occupier at law but the Crown’s immunity from tortious liability meant that the Ministry could not be the defendant.¹⁶⁰ The Treasury Solicitor accordingly provided the plaintiff with the name of a ministry official as nominal defendant. However, the claim could not succeed because the officer had not breached any duty of care – he “had nothing whatsoever to do with the accident” and “was not the occupier”.¹⁶¹ Scott LJ acknowledged that “it is very difficult to know whom to sue”¹⁶² when the Crown is the occupier of premises;

¹⁵⁴ *Adams*, above n. 141, at 550, *per* Viscount Simon; 552, *per* Lord Simonds; 554 -555, *per* Lord Uthwatt.

¹⁵⁵ At 550, *per* Viscount Simon.

¹⁵⁶ At 554, *per* Lord Uthwatt.

¹⁵⁷ At 555, *per* Lord Uthwatt.

¹⁵⁸ *Royster v Cavey* [1947] 1 KB 204 (CA).

¹⁵⁹ At 205.

¹⁶⁰ At 206 – 207.

¹⁶¹ At 208, *per* Scott LJ.

¹⁶² At 207 – 208.

however, his Honour and Bucknill and Somervell LJ concurred that the House of Lords' decision in *Adams* prevented them from allowing a claim against a nominal defendant where the real defendant was the Crown.¹⁶³

The judicial blocking of proceedings against nominal defendants propelled the British Government to introduce reform. However, the proposal to make the Crown liable in tort caused considerable disquiet among some government departments.¹⁶⁴ The Admiralty, for example, was concerned about the possibility of liability for nuisance for the discharge of heavy naval guns.¹⁶⁵ This necessitated compromises to the proposed scope of Crown liability under the new legislation.¹⁶⁶

The result was the Crown Proceedings Act 1947. Section 2(1)(a) of the Act made the Crown liable as "if it were a private person of full age and capacity" for the "torts committed by its servants or agents". The Crown would also be liable for the breach of any duty owed by the Crown as an employer or as an owner, occupier, possessor or controller of property.¹⁶⁷ Section 2 did not, however, make the Crown directly liable in tort. Glanville Williams observed that the "general principle" that the king could do no wrong "is left" in the Act, albeit "very wide exceptions are carved out of it."¹⁶⁸

The Act implemented two further significant reforms. First, it abolished the Crown's immunity from suit. The immunity had necessitated the use of petitions of right to claim against the Crown.¹⁶⁹ The Act made proceedings against the Crown a matter of right rather than grace-and-

¹⁶³ At 209, *per* Scott LJ; 211, *per* Bucknill LJ; 212, *per* Somervell LJ.

¹⁶⁴ See Jacob, above n. 90.

¹⁶⁵ At 480.

¹⁶⁶ Anderson, above n. 111, at 17.

¹⁶⁷ Crown Proceedings Act 1947 (UK), s 2(1)(c).

¹⁶⁸ Williams, above n. 27, at 28.

¹⁶⁹ Crown Proceedings Act 1947 (UK), s 1.

favour. Secondly, the Act enabled discovery and interrogatory orders to lie against the Crown.¹⁷⁰ Previously, the Crown was exempt from such orders.¹⁷¹

Contemporary commentators described the Crown Proceedings Act 1947 as “revolutionary”.¹⁷² Many former colonies of the United Kingdom updated their own Crown proceedings legislation over the next few decades,¹⁷³ with some using the 1947 English legislation as a model and others departing from it significantly.¹⁷⁴

The New Zealand Parliament enacted the Crown Proceedings Act 1950. The Act repealed the Crown Suits Act 1908 and Crown Suits (Amendment) Act 1910¹⁷⁵ and substantively adopted the language and key provisions of the Crown Proceedings Act 1947. One may wonder why this was the case when the existing legal framework in New Zealand permitted suits against the Crown in tort and had dispensed with the requirement for fiat (albeit retaining the term “petition of right”). It appears that the New Zealand Law Revisions Committee preferred to use the English statute as a model in order to achieve uniformity between New Zealand and English law and incorporate the procedural reforms in connection with discovery and interrogatories against the Crown.¹⁷⁶

¹⁷⁰ At s 28.

¹⁷¹ See Thomas Barnes “The Crown Proceedings Act, 1947” (1948) 26 Can. B. Rev. 387 at 398.

¹⁷² At 387.

¹⁷³ For Australian legislation, see: Crown Proceedings Act 1992 (ACT); Crown Proceedings Act 1988 (NSW); Crown Proceedings Act 1993 (NT); Crown Proceedings Act 1980 (Qld); Crown Proceedings Act 1992 (SA); Crown Proceedings Act 1993 (Tas); Crown Proceedings Act 1958 (Vic); Crown Suits Act 1947 (WA); for Canadian legislation, see: Crown Liability and Proceedings Act RSC 1985 c C-50; Proceedings against the Crown Act SA 1959 c 63 (now Proceedings against the Crown Act RSA 2000 c P-25); Crown Proceedings Act SBC 1974 c 24 (now Crown Proceedings Act RSBC 1996 c 89); Proceedings against the Crown Act SM 1951 c 13 (now Proceedings against the Crown Act CCSM 1987 c P140); Proceedings against the Crown Act SNB 1952 c 10 (now Proceedings against the Crown Act RSNB 1973 c P-18); Proceedings against the Crown Act SN 1973 c 59 (now Proceedings against the Crown Act RSNL 1990 c P-26); Proceedings against the Crown Act SNS 1951 c 8 (now Proceedings against the Crown Act RS 1989 c 360); Proceedings against the Crown Act SO 1962 c 109 (now Proceedings against the Crown Act RSO 1990 c P-27); Crown Proceedings Act SPEI 1973 c 28 (now Crown Proceedings Act RSPEI 1988 c C-32); Proceedings against the Crown Act SS 1952 c 35 (now Proceedings against the Crown Act RSS 1978 c P-27).

¹⁷⁴ For commentary, see Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013) at 178 – 184; Hogg, Peter, Monahan, Patrick and Wright, Wade *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at 8 – 10.

¹⁷⁵ Crown Proceedings Act 1950, Schedule 4.

¹⁷⁶ Anderson, above n. 111, at 18.

The Crown Proceedings Act 1950 met with positive reception. Parliamentary debates that preceded the statute were “short” and “rather congratulatory.”¹⁷⁷ A lengthy editorial article in the New Zealand Law Journal described the statute’s provisions on tortious liability as:¹⁷⁸

a happy combination of the now-repealed pioneer provisions of the [Crown Suits (Amendment) Act 1910] with the drafting improvements of s 2 of the United Kingdom statute, not so much for the purpose of changing the well-known local provisions as to create a uniformity between the New Zealand and United Kingdom legislation.

No one appears to have questioned whether the language of the Crown Proceedings Act decreased the existing scope of Crown liability in tort. Glanville Williams’ observation that the English Act preserved the maxim of the king’s infallibility seemingly went unheard.

7.5.2. No direct liability in tort

Section 6(1) of the Crown Proceedings Act 1950 provides:¹⁷⁹

6 Liability of the Crown in tort

- (1) Subject to the provisions of this Act and any other Act, and except as provided in subsection (4A) or (4B), the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –
- (a) in respect of torts committed by its servants or agents;
 - (b) in respect of any breach of those duties which a person owes to his or her servants or agents at common law by reason of being their employer; and
 - (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property:

¹⁷⁷ Ibid.

¹⁷⁸ Editorial “The Crown Proceedings Act, 1950” (1952) 28(2) NZLJ 17 at 50.

¹⁷⁹ The exceptions under subsections 4A and 4B are addressed later.

provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against the servant or agent or his or her estate.

The language of s 6(1) appears to preclude direct Crown liability in tort except as provided in subsections (1)(b) and (1)(c). These subsections make the Crown liable where it owes a duty as an employer or as an owner, occupier, possessor or controller of property. Crown liability is otherwise vicarious and is contingent on wrong-doing on the part of individual servants and agents.

New Zealand courts have not ruled out the possibility of direct Crown liability under s 6; however, nor have they recognised it despite ample opportunities to do so. In *Couch v Attorney-General (No 2)*,¹⁸⁰ Tipping J noted the argument that “the Crown can be liable vicariously but not by attribution” but decided that the point “does not have to be resolved here.”¹⁸¹ Blanchard J agreed with Tipping J and added that “the law on that topic [of direct Crown liability]...is uncertain.”¹⁸² In *Strathboss v Attorney-General*,¹⁸³ the High Court described the subject of direct Crown liability as “a difficult one” and considered it “appropriate not to venture any views on the matter.”¹⁸⁴

The absence of direct Crown liability has theoretical and practical implications. From a theoretical standpoint, the law maintains the historical distance between the infallible Crown and the fallible servant. It does not recognise a collective will to do wrong. The primary wrong-doer has to be an individual servant or agent before the Crown can be vicariously liable. McLean writes that there is no recognition of any “originating fault in the Crown”.¹⁸⁵ Accordingly, “the benign nature of the

¹⁸⁰ *Couch v Attorney-General (No 2)* [2010] NZSC 27.

¹⁸¹ At [173] and fn 264, *per* Tipping J.

¹⁸² At [71], *per* Blanchard J.

¹⁸³ *Strathboss Kiwifruit Limited v Attorney-General* [2018] NZHC 1559.

¹⁸⁴ At [1376], *per* Mallon J.

¹⁸⁵ McLean, above n. 42, at 229.

collective will” is preserved.¹⁸⁶ The vicarious nature of Crown liability means that the Crown remains free from any “blame or fault” and escapes “the same level of moral opprobrium as direct liability”.¹⁸⁷ McLean’s comments resonate with Glanville Williams’ observation that the similarly-worded s 2 of the Crown Proceedings Act 1947 (UK) retains the “general principle” that the king could do no wrong.¹⁸⁸

The fact that Crown liability is contingent on individual wrong-doing has two practical implications. First, it is difficult to pin liability on anyone in case of systematic failures by unincorporated public entities. Secondly, courts struggle to explain the basis of Crown liability where the officer who has committed a wrong enjoys a statutory immunity for his or her acts and omissions. The ensuing discussion examines these two issues.

7.5.2.1. Uncertain prospect of institutional liability

Institutional liability is a form of direct liability. It recognises systematic failures by an institution. It differs fundamentally from vicarious liability in that it does not require primary wrong-doing by an individual within the institution: the wrong-doing can comprise the cumulative actions and states of mind of several individuals within the institution. To quote Baillie, institutional liability is “a square peg” to vicarious liability’s “round hole”.¹⁸⁹

This makes s 6(1)(a) inadequate for holding the Crown liable in cases of systematic failures. Section 6(1)(a) is contingent on primary wrong-doing by individual servants and agents. Anderson writes that s 6(1)(a) means that “if you cannot pin responsibility on an individual you must sue something other than the Crown.”¹⁹⁰ This does not pose any problem where there is a systematic failure on the part of an incorporated entity such as a statutory entity. Section 15 of the Crown

¹⁸⁶ At 232.

¹⁸⁷ At 229.

¹⁸⁸ Williams, above n. 27, at 28.

¹⁸⁹ Rachael Baillie “A square peg in a round hole: reshaping the approach to systematic negligence in the modern public service” (2014) 20 Auckland U. L. Rev. 45.

¹⁹⁰ Anderson, above n. 111, at 18 – 19.

Entities Act 2004 provides that a statutory entity is a “body corporate” and “a legal entity separate from its members, office holders, employees and the Crown.” Statutory entities therefore have the legal personality to be sued in their own name and can be liable for systematic negligence.¹⁹¹ However, ministries are not Crown entities and, where unincorporated, cannot be sued in their own name.¹⁹² Section 14 of the Crown Proceedings Act provides that plaintiffs must sue the Attorney-General on behalf of the Crown in respect of unincorporated entities. Thus, plaintiffs can find themselves in an impossible position where there is systematic negligence on the part of an unincorporated public entity: they cannot sue the entity because it is unincorporated and they cannot sue the Crown because s 6(1) appears to limit the Crown’s tortious liability to wrongs by individual servants and agents.

A number of claims against the Crown have floundered because the plaintiff did not make out misfeasance in public office by individual officers, notwithstanding the presence of a systematic failure.¹⁹³ In *Minister of Fisheries v Pranfield Holdings Limited*,¹⁹⁴ the Court of Appeal rejected the plaintiff’s claim for compensation because the plaintiff could not prove misfeasance by a particular public officer.¹⁹⁵ This was notwithstanding multiple instances of “failure of public administration” on the part of the Ministry.¹⁹⁶ In *Delamere v Attorney-General*,¹⁹⁷ Heath J struck out a claim against the Attorney-General on the basis that the claim was an “illegitimate” one for institutional liability.¹⁹⁸ The plaintiff had alleged wrongdoing by six employees of Immigration New Zealand but his allegations were “all directed to the acts or omissions of ‘Immigration New Zealand’ (as ‘the Crown’) as opposed to the six named employees.”¹⁹⁹

¹⁹¹ At 19.

¹⁹² Ibid.

¹⁹³ For a fuller discussion, see Baillie, above n. 189.

¹⁹⁴ *Minister of Fisheries v Pranfield Holdings Limited* [2008] NZCA 216.

¹⁹⁵ For the focus on individual wrongdoing, see legal analysis at [104] – [130].

¹⁹⁶ At [111].

¹⁹⁷ *Delamere v Attorney-General* HC Auckland CIV 2008-404-1377, 3 March 2010.

¹⁹⁸ At [22].

¹⁹⁹ At [27].

Courts have occasionally hinted that claims for institutional liability may be possible notwithstanding s 6(1)(a). In *Mihaka v Attorney-General*,²⁰⁰ McJechan J allowed an application by the plaintiff that the Attorney-General should be joined as second defendant “in respect of the negligent and/or unlawful actions of employees of the Department of Justice”.²⁰¹ The plaintiff had not identified the employees who he alleged had been negligent.²⁰² This indicates that the Court did not consider it “entirely plain”²⁰³ as a matter of law that the Department of Justice could not be institutionally liable. However, the decision is inconsistent with the language of s 6(1)(a) and incorrect as a matter of principle.

Courts have sometimes allow plaintiffs to sue unincorporated entities directly notwithstanding that the entity lacks legal personality to be sued and the correct defendant in such cases is the Attorney-General on behalf of the Crown.²⁰⁴ It appears that such arrangements are often by consent between counsel for the department and the plaintiff.²⁰⁵ However, this is also not a principled solution and such arrangements do not always eventuate. Anderson aptly remarks that “[t]here is no virtue in a statutory rule that judges and crown counsel conspire to evade, but which remains available as a trump card should the crown wish to play it.”²⁰⁶

Systematic wrong-doing can pose additional complexities where there is a subjective element to the tort. In *Couch v Attorney-General (No. 2)*, Tipping J observed that “adding the knowledge and attitudes of two or more persons together...to ascribe the combination to a body as a whole”

²⁰⁰ *Mihaka v Attorney-General* HC Wellington CP No 370/86, 3 September 1987.

²⁰¹ At 4 and 6 – 7.

²⁰² At 3.

²⁰³ At 6.

²⁰⁴ Baillie, above n. 189, at 54, fn 70 – 73, citing *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (CA) at 255; *Reid v New Zealand Fire Service Commission* [2010] NZCA 133 at [13]; *Read v Minister of Economic Development* HC Auckland CIV02007-404-2655, 12 September 2007; see also Anderson, above n. 111, at 21.

²⁰⁵ *Ibid.*

²⁰⁶ Anderson, above n. 111, at 21.

presented “a jurisprudential difficulty.”²⁰⁷ The Court refused to rule out the possibility of institutional liability in such cases but whether it is possible remains uncertain.²⁰⁸

The difficulties with establishing institutional liability under s 6(1) contrasts with the simplicity with which the 19th century courts found the Crown liable in tort in *Williams* and *Dawson*.²⁰⁹ In *Williams*, for instance, the Privy Council had no difficulty attributing the harbour master and Secretary of the Marine Department’s knowledge of the danger to the executive government and finding that the executive government as a whole owed a duty to inquire into the danger and warn vessels of the danger through its servants.²¹⁰ The government’s duty was not contingent on the finding of tort on the part of any of these officers at an individual level. Similarly, the Court in *Dawson* spent no time considering the liability of the individual decision-makers for not taking steps to offset the greater risks from using lignite coal; it focused on the duty of care and breach of duty on the part of government as a whole.²¹¹ The approach in *Williams* and *Dawson* was patently simpler and created a wider window for individuals to claim damages for harm suffered.

It is submitted that the simpler analysis of the Crown’s institutional liability in 19th century cases arises from the Crown Suits Acts’ recognition of direct liability in tort. Section 37(2) of the Crown Suits Act 1881 recognised wrongs “by” or “under the authority of” “the Governor on behalf of Her Majesty or of Her Majesty’s Executive Government in the colony”. Section 3(c) of the Crown Suits (Amendment) Act 1910 allowed claims or demands against the Crown in respect of “any wrong or injury which is independent of contract”. Neither provision required a finding of a wrong by a servant or agent before the Crown could be liable. On the other hand, s 6(1) of the Crown Proceedings Act makes the Crown liable “in respect of torts committed by its servants and

²⁰⁷ *Couch (No 2)*, above n. 180, at [160].

²⁰⁸ At [110] – [115].

²⁰⁹ See discussion in Section 7.4.2.

²¹⁰ Privy Council decision in *Williams*, above n. 125, at 431.

²¹¹ *Dawson*, above n. 126, at 13, *per* Johnston, Acting CJ; 15, *per* Richmond J; 17, *per* Gillies J.

agents”. Section 6(1) retains the 19th century English emphasis on the personal liability of Crown servants to the detriment of individuals who suffer from the systematic failures of the executive.

7.5.2.2. Impact of officers’ immunities on Crown vicarious liability

Subsections 6(1)(a) and 6(4) impose significant limits on the scope of the Crown’s vicarious liability where officers enjoy statutory immunities. The proviso to s 6(1)(a) is that:

no proceedings shall lie against the Crown by virtue of in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of [the Crown Proceedings Act] have given rise to a cause of action in tort against that servant or agent or his or her estate.

The proviso indicates that the Crown cannot be liable for the act or omission of a servant or agent where no action can arise against the servant or agent. This appears to immunise the Crown whenever a statute confers an immunity on a servant or agent.

Section 6(4) adds a further limitation to Crown liability:

Except as provided in subsection (4A) or (4B), any enactment which negatives or limits the amount of the liability of any government department or officer of the Crown in respect of any tort committed by that department or officer of the Crown in respect of any tort committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against the department or officer.

Simply put, s 6(4) indicates that the effect of a statutory immunity which “negatives” the liability of the government department or officer is to negate the Crown’s liability in tort.

Before 2013,²¹² the proviso to s 6(1)(a) and s 6(4) posed a daunting obstacle to claimants' ability to recover from the Crown damages in respect of the good-faith acts or omissions of public servants – at least in theory.²¹³ Section 86 of the State Sector Act 1987 immunises Public Service chief executives and employees “from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.” This means that a claimant has to establish a lack of good faith on the part of a public servant before that public servant could be liable in tort. This, in turn, invited the argument that the Crown would not be vicariously liable for an act or omission of a public servant unless the he or she had not acted in good faith.²¹⁴

Courts resisted this interpretation of the effect of s 86 of the State Sector Act on Crown liability.²¹⁵ However, judicial attempts to avoid limiting the Crown's liability under s 6 of the Crown Proceedings Act stretched s 86 of the State Sector Act beyond its interpretive limits. In *Couch v Attorney-General (No 2)*,²¹⁶ the majority of the Supreme Court interpreted s 86 as only preventing departments from seeking indemnity from their chief executive officers and employees.²¹⁷ Public servants remained liable to external claimants for their tortious acts and omissions, regardless of good-faith on their part.²¹⁸ This allowed the majority to conclude that s 86 did not invoke the proviso to s 6(1)(a) or s 6(4) of the Crown Proceedings Act. Therefore, the Crown could be vicariously liable in tort even for the good-faith acts and omissions of public servants. Their Honours' interpretation protected claimants' interests but arguably deprived public servants of a protection against external claims that Parliament intended them to have.

²¹² The enactment of the State Sector Amendment Act 2013, s 62(2) and insertion of s 6(4A) of the Crown Proceedings Act 1950 clarified the legal position, as discussed below in this chapter.

²¹³ In practice, the judiciary circumvented this obstacle, as discussed in the paragraphs below.

²¹⁴ Anderson, above n. 111, at 3 – 4.

²¹⁵ *Ibid.*, citing *B v Attorney-General* (1996) 15 FRNZ 173 and *Cottle v Attorney-General*, consolidated with *McBride Street Cars v Rapana* DC Dunedin, 14 December 2005, unreported; Anderson notes at fn 4 that the appeal, reported as *McBride Street Cars v Rapana* [2006] NZAR 697, did not concern the issue.

²¹⁶ *Couch (No 2)*, above n. 180.

²¹⁷ At [7], *per* Elias CJ; [71], *per* Blanchard J; [174], *per* Tipping J.

²¹⁸ *Ibid.*

McGrath J (with Wilson J concurring),²¹⁹ proposed an alternative interpretation. His Honour considered that s 86 of the State Sector Act immunised public servants for their good-faith actions only if they were being sued in their capacities as private persons.²²⁰ It did not prevent the Crown from being vicariously liable for the acts or omissions of Crown servants.²²¹ His Honour founded this interpretation on two premises. First, the purpose of s 6(1) of the Crown Proceedings Act is to make the Crown liable for torts committed by its servants or agents in the same way as “a private person of full age and capacity”.²²² Secondly, s 27(3) of the New Zealand Bill of Rights Act 1990 provides that:²²³

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

In his Honour’s view, these statutory indicators weighed against interpreting the proviso to s 6(1) and s 6(4) as immunising the Crown from tortious liability for the good-faith acts and omissions of public servants. McGrath J’s interpretation allowed public servants to benefit from the immunity under s 86 without restricting the Crown’s liability.²²⁴

The Supreme Court’s divided interpretation of s 86 of the State Sector Act left the law in a state of uncertainty until Parliament amended s 6 of the Crown Proceedings Act in 2013.²²⁵ The amendment inserted a new subsection, s 6(4A), which provided:

²¹⁹ At [250].

²²⁰ At [191] – [193], *per* McGrath J.

²²¹ *Ibid.*

²²² At [186].

²²³ At [187] – [189] and [191].

²²⁴ At [191] – [193].

²²⁵ State Sector Amendment Act 2013.

- (4A) Despite certain Crown servants being immune from liability under section 86 of the State Sector Act 1988, -
- (a) a court may find the Crown itself liable in tort in respect of the actions or omissions of those servants; and
 - (ab) ...
 - (b) for the purpose of determining whether the Crown is so liable, the court must disregard the immunity in section 86.

The explanatory note to the 2013 amendment confirmed that McGrath J's interpretation was consistent with parliamentary intent.²²⁶ Parliament intended the Crown to be vicariously liable for public servants' good-faith acts and omissions under s 6(1)(a) regardless of the limitations to Crown liability under the proviso to s 6(1)(a) and s 6(4). In 2016, Parliament inserted a new subsection, 4B, which replicated the effect of subsection 4A in respect of a statutory immunity on persons under s 351 of the Food Act 2014.

The 2013 and 2016 amendments to s 6 have not, however, ended the courts' interpretive struggles. This is because the amendments only confirm that the Crown is vicariously liable despite the immunities under the State Sector Act and the Food Act. It is not clear whether Parliament also intended the Crown to be vicariously liable where its servants or agents enjoy similar immunities for good-faith actions under other statutes, notwithstanding the proviso to s 6(1)(a) and s 6(4).

This issue arose in *Strathboss v Attorney-General*.²²⁷ The case concerned the effect on Crown liability of s 163 of the Biosecurity Act 1993. Section 163 protected inspectors and certain other persons from tortious liability for their good-faith acts and omissions.

²²⁶ State Sector and Public Finance Reform Bill 2013 (55-1) (explanatory note) at 15.

²²⁷ *Strathboss*, above n. 183.

Counsel for the Crown argued that the 2013 and 2016 amendments superseded both the majority and minority interpretations in *Couch (No 2)*.²²⁸ The insertion of subsections 4A and 4B in s 6 indicated that Parliament wanted the Crown to have the benefit of any statutory immunity that attaches to officers under statutes other than the State Sector Act and Food Act.²²⁹ This meant that the proviso to s 6(1)(a) and s 6(4) immunised the Crown from tortious liability in respect of inspectors' acts and omissions that enjoyed the immunity under s 163 of the Biosecurity Act.

On the other hand, counsel for the claimant argued that the 2013 amendment was intended to supersede only the majority's interpretation in *Couch (No 2)*.²³⁰ The 2013 and 2016 amendments were consistent with McGrath J's approach, which was to restrict any statutory immunity for good-faith acts and omissions to officers in their private capacity. Accordingly, the immunity under s 163 of the Biosecurity Act only protected inspectors from being sued in their private capacity. It did not prevent a finding of Crown liability under s 6(1)(a) because the inspectors did not enjoy any immunity as Crown servants or agents.

The claimant was unable to establish the cause of action on the facts.²³¹ Mallon J nonetheless chose to grapple with the proper interpretation of ss 6(1) and 6(4). Her Honour described s 6 as "extremely confusing and difficult to reconcile with s 27(3) of the NZBORA."²³² She favoured McGrath J's interpretation in *Couch (No 2)* – namely that any statutory immunity for good-faith acts and omissions is confined to officers in their private capacity and does not prevent the Crown from being vicariously liable under s 6(1)(a).²³³ McGrath J's interpretation more consistent with s 27(3) of the New Zealand Bill of Rights Act.²³⁴ However, her Honour recognised that there were

²²⁸ At [1367].

²²⁹ Ibid.

²³⁰ At [1312] and [1356].

²³¹ At [1362].

²³² At [1362].

²³³ At [1366].

²³⁴ Ibid.

“strong argument[s]” that Parliament did not intend McGrath J’s interpretation to hold following the 2013 and 2016 amendments.²³⁵

Counsel for the claimant had also attempted to circumvent the obstacle of s 6(4) by arguing that an officer’s immunity only negates the Crown’s liability under that subsection if instituting proceedings against the officer is a means of instituting proceedings against the Crown under s 14(2)(b) of the Crown Proceedings Act.²³⁶ Since suing a biosecurity inspector was not a way to institute proceedings against the Crown, an inspector’s immunity did not negate the Crown’s liability under s 6(4). Mallon J agreed with this interpretation but with a hint of uncertainty: her Honour noted that s 6(4) was “worded very difficultly.”²³⁷

The judgment in *Strathboss* spans 490 pages of which 37 are devoted to the discussion on the Crown’s immunity. It illustrates that s 6 remains a source of extreme analytic difficulty for courts.

It is submitted that the analytic difficulty is once again attributable to the absence of direct Crown liability in tort. The logic of s 6(1)(a) demands that there can be no secondary or vicarious liability where there is no primary wrong-doing. The argument raised by counsel for the Crown in *Strathboss* has considerable merit notwithstanding its limiting impact on claimants’ ability to recover damages from the Crown. In both *Couch (No 2)*²³⁸ and *Strathboss*, the claimants and the courts tried to circumvent the logic of ss 6(1)(a) through ingenious interpretations but these have come at the cost of conceptual complexity and legal uncertainty. Mallon J’s reasoning in *Strathboss* is *obiter* and her acknowledgment of the strength of the Crown’s arguments²³⁹ leave the legal position far from settled. Litigants and the public are likely to have to continue bearing the costs of the complexity and uncertainty in terms of legal fees and court time and resources.

²³⁵ At [1368] and [1370].

²³⁶ At [1374].

²³⁷ *Ibid.*

²³⁸ *Couch (No 2)*, above n. 180.

²³⁹ At [1368] and [1370].

It is submitted that introducing direct liability for the executive government in tort would eliminate the analytic difficulty posed by officers' immunities. It will be recalled that the State's direct liability in public law damages bypasses any individual officers' immunity.²⁴⁰ Lord Diplock noted in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* that the basis of public law damages for a judicial breach of a constitutional guarantee was "not vicarious liability" but "a liability of the state itself."²⁴¹ The New Zealand Court of Appeal adopted this reasoning in *Baigent's case*.²⁴² Accordingly, direct State liability already exists in New Zealand.

Direct State liability in tort would make the acts or omissions of an officer the acts or omissions of the State. A statutory immunity that prevents a finding of tort on the part of the officer because of the good-faith nature of their act or omission would not prevent a finding of tort on the State's part. Courts and counsel would not have to go to the lengths of *Couch (No 2)* and *Strathboss* to find that individuals have remedies against the State when the officer responsible for the wrong cannot be sued.

7.6. A missed opportunity for reform

Unfortunately, the executive government seems averse to direct liability. In 2014, a New Zealand Law Commission report recommended that the Crown Proceedings Act 1950 should be replaced with a more "modern"²⁴³ statute which should make the Crown directly liable in tort.²⁴⁴ The report highlighted the difficulties in holding the Crown liable for systematic failures²⁴⁵ and identified the problems with establishing Crown liability where an officer enjoys immunity under

²⁴⁰ See Section 5.3.

²⁴¹ *Maharaj v A-G for Trinidad and Tobago* [1978] 2 All ER 670 at 679, *per* Lord Diplock.

²⁴² *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667; 1 HRNZ 42 at 58, *per* Cooke P; 75, *per* Casey J; 80- 81, *per* Hardie Boys J; 104, *per* McKay J.

²⁴³ Law Commission *A new Crown civil proceedings Act for New Zealand* (NZLC IP35, 2014) at iii.

²⁴⁴ At [2.5]; see also the discussion in [3.1] – [3.42].

²⁴⁵ At [3.8] and [3.8].

a statute in the light of *Couch (No 2)*.²⁴⁶ It pointed out that other jurisdictions have direct Crown liability without adverse consequences.²⁴⁷

The New Zealand Government dismissed the recommendation to make the Crown directly liable in five bullet points.²⁴⁸ The first objection to direct liability was that it could “lead to an extension of the scope of Crown liability at common law.”²⁴⁹ Secondly, the difference between the treatment of government and other litigants was “justified because the Crown serves the public as a whole as a matter of duty.”²⁵⁰ Thirdly, the Crown’s international obligations required the Crown to act in ways that could be to the detriment of private citizens.²⁵¹ Fourthly, “individual department responsibility for indemnity could disrupt a department’s work programme or business as usual functions”.²⁵² Lastly, the Crown was different to individuals and corporations in that it could not be wound up.²⁵³

The Government’s response comprise one-sentence generic assertions that have neither explanation nor examples to allow a reader to scrutinise their validity. It is not explained how direct liability would extend the scope of Crown liability and indeed, why that would be undesirable if the broader scope were to allow more deserving claims for systematic failures than currently possible. The assertion that the “Crown serves the public as a whole” assumes that the executive’s breaches are benevolently motivated. It ignores the whole subset of breaches that comprise failures to comply with reasonable standards or worse, indicate an abuse of power. The reference to international obligations is disingenuous because international obligations do not

²⁴⁶ At [2.5]; see also the discussion in [6.10] – [6.23].

²⁴⁷ At [3.11].

²⁴⁸ “Government response to Part A of the Law Commission’s report ‘The Crown in court: a review of the Crown Proceedings Act and national security information in proceedings’ (13 June 2016) *New Zealand Parliament* <www.parliament.nz>; see also (14 June 2016 – 16 June 2016) 16.14 *Journal of the House of Representatives of New Zealand: fifty-first Parliament* Schedule, i.

²⁴⁹ Government response, above n. 248, at 3.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

have the force of law in New Zealand unless they are incorporated in domestic statutes.²⁵⁴ The mere existence of an international obligation does not override recognised legal rights in domestic law. The Government's response also does not explain how "individual departmental responsibility for indemnity could disrupt work programme or business as usual functions" – it is difficult to understand precisely what this is intended to mean. Nor is it understandable why the Government considered it necessary to point out that the Crown cannot be "wound up";²⁵⁵ the Law Commission had not suggested that it could and there seems to be no reason why direct Crown liability in tort would result in the Crown being "wound up". The reasons for the Government's rejection of direct liability in tort seem to be a hasty escape route from what may otherwise have been a losing debate.

7.7. Conclusion

The preceding discussion shows that the historical reason for the lack of direct liability is the maxim "the king can do no wrong" and its irrational extension to the Crown qua executive. Nineteenth century New Zealand legislation concerning Crown liability had made the Crown directly liable in tort and judicial analysis in cases such as *Williams*²⁵⁶ and *Dawson*²⁵⁷ were significantly simpler because of it. There is no tenable justification for the absence of direct liability under s 6 of the Crown Proceedings Act. Quite the opposite: the complications arising from the absence of direct liability are severe. It is now difficult to find the Crown institutionally liable for systematic failures and the analysis of Crown liability where officers enjoy statutory immunities is highly convoluted. Making the executive government direct liability in tort is the solution to all these problems. Unfortunately, there is a lack of political will to achieve this change.

²⁵⁴ W John Hopkins "New Zealand" in Dinah Shelton (ed) *International law and domestic legal systems: incorporation, transformation and persuasion* (Oxford University Press, Oxford, 2011) 429 at 437.

²⁵⁵ Government response, above n. 248, at 3.

²⁵⁶ Court of Appeal decision in *Williams* above n. 111; Supreme Court decision in *Williams*, above n. 125; Privy Council decision in *Williams*, above n. 125.

²⁵⁷ *Dawson*, above n. 126.

Chapter 8: Immunity from mandatory orders

8.1. Overview

The Crown is immune from mandatory orders.¹ Officers of the Crown are also exempt from such orders if the effect of the order would be to enjoin the Crown itself.² This chapter argues that these immunities are unjustified. They are responsible for immense incoherence in legal reasoning and should be abolished.

The first part of the chapter critiques the rationale for the Crown's immunity from mandatory orders. It establishes that the immunity originates from the historical principle that the Sovereign's courts cannot order the Sovereign. The Crown Proceedings Act 1947 (UK) and its New Zealand counterpart, the Crown Proceedings Act 1950, retained this immunity to protect against the risk of undue judicial interference with executive action.³ However, the immunity is disproportionate to this risk and is untenable.

The second part of the chapter highlights the incoherence created by the rule that no mandatory order can lie against officers if the effect would be to enjoin the Crown. It shows that courts get into "impossible tangles"⁴ as they grapple with the question whether an order against ministers amounts to an order against the Crown. This question resurrects the debate over whether the Crown is a corporation sole distinct from its ministers or a corporation aggregate comprising its ministers. Some academics consider *M v Home Office*⁵ to have satisfactorily resolved the legal position by ruling that the Crown's immunity does not extend to its ministers even when they are acting in their official capacities. However, the decision is a reiteration of the corporation sole

¹ Crown Proceedings Act 1950, s 17(1); Judicial Review Procedure Act 2016, s 15(3).

² Crown Proceedings Act 1950, s 17(2).

³ The English equivalent to s 17 of the Crown Proceedings Act 1950 is s 21 of the Crown Proceedings Act 1947 (UK).

⁴ Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1154.

⁵ *M v Home Office* [1994] 1 AC 377 (HL) ["House of Lords in *M*"]; for discussion of the reception of this case, see Section 8.3.3.4.

analogy. It forces a distinction between the Crown and its ministers and leaves the Crown's own immunity intact. The chapter concludes that abolishing the immunity from mandatory orders would greatly assist legal coherence.

8.2. Untenable rationale

The ensuing discussion shows that the rationale for the immunity from mandatory orders has shifted from the principle that the Sovereign's courts cannot order the Sovereign to the policy reason that removing the immunity would lead to inappropriate judicial interference with executive action. However, there has been little enquiry into the proportionality of the immunity to the concern: sweeping statements about the risk of undue judicial interference have prevailed over arguments that the immunity is archaic and unnecessary. The first part of the ensuing discussion outlines how the Crown Proceeding Act of 1947 (UK) retained the immunity without critical assessment of its necessity. The second part assesses the modern justifications offered for the immunity and the arguments against it. It is submitted that the justifications offered for the immunity are inadequate and the immunity is overall untenable.

8.2.1. Uncritical retention of immunity

The rule that mandatory orders were unavailable against the Crown was historically rooted in the reality that the king's courts could not command the king.⁶ Seventeenth century judges held office at the king's pleasure; the king could dismiss them if he chose to do so.⁷ It would have been unthinkable for the courts to attempt to coerce the king by making orders such as injunction or specific performance.

The rule has outlasted the reality. The principle of judicial independence was well-established by the 19th century.⁸ Increasingly, the apparatus of executive government exercised the powers that

⁶ Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at 46.

⁷ Garry Slapper and David Kelly *The English legal system* (7th ed, Cavendish, London, 2004) at 219.

⁸ *Ibid.*

the Sovereign once personally exercised.⁹ Nonetheless, the rationale that the king's courts cannot command the king continued to feature in 19th century decisions where the courts refused to grant mandamus against the Crown. In *R v Powell*,¹⁰ a person who had tenement in a manor vested in the Crown was unable to obtain mandamus to compel the steward to admit her as tenant. Lord Denman CJ commented on "the incongruity in the Queen commanding herself to do an act".¹¹ This was despite the fact that statute had vested control over those estates in the Commissioners of Woods and Forests and empowered them to dispose of and regulate the estates as they thought best for the public service of the country.¹²

Similarly, in *R v Lords Commissioners of the Treasury*,¹³ Cockburn CJ reluctantly declined to order mandamus against the Lords Commissioners of the Treasury to compel them to pay a sum that it was their statutory duty to pay to the treasury of Lancaster County. His Honour stated:¹⁴

[W]e must start with this unquestionable principle that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of question. Over the Sovereign we have no power.

By 1920, the rationale for the immunity had become more pragmatic. The memorandum of Sir John Mellor, Treasury Solicitor, noted that the practical purpose of the immunity was to prevent "undue interference by the courts with the Executive in matters which ought properly to depend upon the responsibility of the department concerned."¹⁵ This greater transparency surrounding the rationale of the immunity was offset by a failure to enquire into the proportionality of the

⁹ See Section 4.4.

¹⁰ *R v Powell* (1841) 1 QB 352; Thomas Erskine Perry and Henry Davison (eds) *Reports of cases argued and determined in the Court of Queen's Bench* (Vol. 4, Sweet & Maxwell, London, 1842) 719.

¹¹ At 721 and 725.

¹² At 723 – 724.

¹³ *R v Lords Commissioners of the Treasury* (1872) [LR] 7 QB 387.

¹⁴ At 394.

¹⁵ John Mellor *Memorandum* (LCO2/1094(1), 1921) at 55 – 56, quoted by Joseph Jacob *The Republican Crown* (Dartmouth, Aldershot, 1996) at 76.

immunity to the risk of judicial interference. The Mellor Memorandum noted that “it ha[d] never been necessary to consider and divide the cases in which there would be a serious and substantial objection” to interference by courts and cases where an injunction would be “entirely appropriate and unobjectionable”.¹⁶ In other words, there had been no assessment of whether any benefit to public interest by retaining the immunity outweighed the costs to individual rights.

The debates preceding the Crown Proceeding Act 1947 would have been a fitting opportunity to consider the need for, and proportionality of, the Crown’s immunity from mandatory orders. The very purpose of the Act had been to abolish two other historic immunities – those in suit and tort.¹⁷ It appears that the British Government had initially proposed that the immunity from mandatory orders should also be abolished.¹⁸ However, the Service Departments insisted on retaining the immunity.¹⁹ During the Second Reading, Mr JSC Reid MP, of Glasgow, objected that the Act would change the legal position in Scotland, where previously mandatory orders were available against the Crown. Mr Reid MP said: ²⁰

The only possible reason for [having the immunity]...is that the Government are not prepared to trust those who are entrusted with jurisdiction in these matters to act reasonably. I see no reason whatsoever for taking away a right of that kind from the subject. We have got through two wars without this alteration...

Not many others shared his concern. One Member of Parliament queried the bill’s proposal to immunise Crown servants when the effect would be to enjoin the Crown but accepted that “[o]bviously one cannot injunct the Crown”.²¹ The Lord Advocate, defending the immunity,

¹⁶ At 75 – 76.

¹⁷ See Section 7.5.1.

¹⁸ See JSC Reid’s address at (4 July 1947) 439 GBPD (Series 5) HC 1741; see also Law Commission *Mandatory orders against the Crown and tidying judicial review* (NZLC SP 10, 2001) at [42].

¹⁹ Ibid.

²⁰ Ibid.

²¹ Letter from Quintin Hogg, Member of the House of Commons to Hartley Shawcross, Member of the House of Commons regarding draft Crown Proceedings Bill (6 February 1947), LCO 2/3362, quoted by Joseph Jacob “The debates behind an Act: Crown proceedings reform 1920 – 1947” (1992) 3 Public Law 452 at 480.

insisted that there were “general reasons for preferring declaratory order to interdict [that is, mandatory orders]” against the Crown.²² He cautioned that “the Crown may have to take certain steps at the shortest possible notice which infringe the rights of the subject”.²³ He also appeared to suggest that “it might be a national disaster if the Crown”²⁴ were prevented from doing so by a mandatory order; however, the sentence remains tantalisingly unfinished: Hansard reports that Mr Reid MP interrupted by asking “why...the Crown should have to act so much more rapidly than it had to in the past in the case of two great wars”²⁵ and the Lord Advocate then changed the subject. The evasion perhaps typifies the overall attitude to the question of why the immunity should be retained.

The upshot was that the immunity from mandatory orders has remained under the Crown Proceeding Act 1947 (UK) and its New Zealand counterpart the Crown Proceedings Act 1950. Section 21 of the English legislation and s 17 of the New Zealand legislation limit a court’s jurisdiction to declaratory relief in situations where a court would otherwise have the discretion to order mandatory relief against any party other than the Crown. Section 17 of the New Zealand legislation provides:

- (1) In any civil proceedings under this Act by or against the Crown or to which the Crown is a party or third party the court shall, subject to the provisions of this Act and any other Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
- provided that –
- (a) Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific

²² (4 July 1947) 439 GBPD (Series 5) HC 1749.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

- performance, but may instead make an order declaratory of the rights of the parties; and
- (b) In any proceedings against the Crown for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may instead make an order declaring that any person is entitled as against the Crown to the land or property or to the possession thereof.
- (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

The immunities under s 17 apply in “civil proceedings”.²⁶ Section 2 of the Act excludes from the definition of “civil proceedings” any proceedings in relation to habeas corpus, mandamus, prohibition, certiorari or for judicial review. However, the immunities also apply in judicial review proceedings at common law: the mandatory orders of mandamus, prohibition and certiorari, also known as “prerogative writs”,²⁷ are unavailable directly against the Crown.²⁸

8.2.2. Contested modern justifications

The immunity from mandatory orders (both in civil proceedings and judicial review) is controversial across common law jurisdictions. Australian states have generally discarded the immunity²⁹ but it remains in the United Kingdom,³⁰ Canada³¹ and New Zealand. In the past two

²⁶ Crown Proceedings Act 1950, Long Title.

²⁷ Joseph, above n. 4, at 1147; for a discussion of the history of these writs, see S A de Smith “The prerogative writs” (1951) 11 Camb. LJ 40.

²⁸ House of Lords in *M*, above n. 5, at 424, *per* Lord Woolf; see Law Commission, above n. 18; see also s 15(3) of the Judicial Review Procedure Act 2016 for the immunities in the context of interim orders.

²⁹ See Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013) at 238 – 242; the following statutes remove the Crown immunity from injunctions: the Judiciary Act 1903, s 60; Crown Proceedings Act 1988 (NS), s 3; Crown Proceedings Act 1980 (Qld), s 10; Crown Proceedings Act 1958 (Vic), s 23(1)(a); the following statutes remove the Crown’s immunity from injunctive relief but retain an immunity from mandatory injunctions: Crown Proceedings Act 1992 (SA), s 7; Crown Proceedings Act 1993 (Tas), s 8; Court Procedures Act 2004 (ACT), s 24; Crown Proceedings Act 1993 (NT), s 8.

³⁰ Crown Proceedings Act 1947 (UK), s 21.

³¹ Hogg, Monahan and Wright, above n. 6, at 46: Crown Liability and Proceedings Act RSC 1985 c C-50, s 22; Proceedings against the Crown Act RSA 2000 c P-25, s 17; Crown Proceeding Act RSBC 1996 c 89, s 11(2);

decades, there have been two Law Commission reports recommending the abolition of the immunity³² but the New Zealand government has not acted on this recommendation. This section assesses the justifications for retaining the immunity and the criticisms against it. It concludes that the immunity is disproportionate to the executive's modern functional needs.

The starting point for assessing the appropriateness of the immunity should be the principle of equality before the law.³³ A recurring theme within the Crown Proceedings Act 1950 is to treat the Crown "as if it were a private person of full age and capacity"³⁴ and to allow proceedings to take place as "between subject and subject".³⁵ Section 27(3) of the New Zealand Bill of Rights Act 1990 enshrines the same principle:

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Admittedly, s 5 of the Bill of Rights Act allows for "justified limitations" on the rights and freedoms. However, it requires justified limitations to be "only...such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This requirement sets the tone of the ensuing enquiry: is the immunity from mandatory orders, which limits individuals' remedies against the executive, a "reasonable limit" that is "demonstrably justified"?

Proceedings against the Crown Act CCSM 1987 c P140, s 14(2); Proceedings against the Crown Act RSNB 1973 c P-18, s 14(2); Proceedings against the Crown Act RSNL 1990 c P-26, s 15; Proceedings against the Crown Act RS 1989 c 360, s 16(2); Proceedings against the Crown Act RSO 1990 c P-27, s 14; Crown Proceedings Act RSPEI 1988 c C-32, s 13(2); Proceedings against the Crown Act RSS 1978 c P-27, s 17(2).

³² Law Commission, above n. 18, at [28] – [42]; Law Commission *The Crown in court – a review of the Crown Proceedings Act and national security information in proceedings* (NZLC R135, 2015) at [3.117] – [3.118].

³³ See Joseph, above n. 4, at 153.

³⁴ Crown Proceedings Act 1950, ss 3, 6, 8, 27 and 35.

³⁵ *Ibid.*, s 12(1).

A common justification for the immunity is that the Crown may need to override individual rights in emergencies in the wider public interest. It is critical that the Crown is not fettered by an injunction in such situations. This was the Lord Advocate's reason for supporting the retention of the immunity in the Crown Proceedings Act 1947; it will be recalled that he said that "the Crown may have to take certain steps at the shortest possible notice which infringe the rights of the subject". Sir Thomas Barnes, solicitor for the United Kingdom Treasury, justified the immunity in similar terms in 1952:³⁶

No doubt the principle underlying this provision is that in times of national emergency the Crown may be compelled to take, at the shortest possible notice and with the certainty that its operations will not be interrupted by the courts, measures which may be thought to infringe the rights or alleged rights of the subject...The freedom of the Executive to meet a crisis by action of this kind would be fettered if it were open to the subject to obtain an interim injunction restraining the Crown from doing what it thought necessary in the public interest.

The justification has questionable merit. It is unclear how the need for the executive to be free to act in an emergency supports the application of the immunity beyond the emergency situation.³⁷ For example, should the government be able to breach a commercial contract in a non-emergency or ignore a statutory duty to keep a road in good condition without fear of an order compelling performance? A blanket immunity against mandatory orders in all situations appears disproportionate to concerns specific to emergencies. A more proportionate response would be to enact law that stipulates that a court cannot make a mandatory order against the executive when a state of emergency is in place in relation to actions connected to the government response to that emergency. This would alleviate any concern about fettering the executive's ability to respond to emergencies in the wider public interest, while allowing mandatory orders to lie against the Crown in non-emergency situations as against any other person.

³⁶ Thomas, Barnes "The Crown Proceedings Act, 1947" (1948) 26 Can. B. Rev. 387 at 395.

³⁷ B V Harris "Interim relief against the Crown" (1981) 5(1) Otago L. Rev. 92 at 104.

Some have suggested that there is a more general “public interest” justification for allowing the Crown to override individual rights in situations other than emergencies. Harris writes:³⁸

[I]t is possible to imagine circumstances where the public interest would be better served by non-observance of the Rule of Law, remembering that the government is ultimately responsible to parliament and the electorate, the latter assessing through the ballot box whether government actions are in the public interest.

In 2016, the New Zealand government used a similarly broad “public interest” justification³⁹ to reject Law Commission’s recommendation that the courts should have jurisdiction to “grant any remedy in civil proceedings against the Crown.”⁴⁰ The government considered that “treating the Government differently from other litigants, especially corporations, can be justified, because the Crown serves the public as a whole as a matter of duty”.⁴¹

The concern with this general “public interest” justification is that it is too vague to allow any assessment of its validity. It begs the question, “in what kind of situations would it be in the public interest for the government not to be bound by mandatory orders?”; if provided with further examples, the next logical question is whether it would not be better for legislation to exempt the executive from mandatory orders in those specific situations rather than create a blanket immunity for the Crown.

Further, the “public interest” justification assumes that the executive’s motives in breaching the law or in overriding an individual’s right would align with the public interest. This ignores the

³⁸ At 95.

³⁹ Law Commission *A new Crown civil proceedings Act for New Zealand* (NZLC IP35, 2014) at 61.

⁴⁰ “Government response to Part A of the Law Commission’s report ‘The Crown in court: a review of the Crown Proceedings Act and national security information in proceedings’” (13 June 2016) *New Zealand Parliament* <www.parliament.nz> at 3.

⁴¹ *Ibid.*

complex motivations behind executive decision-making. A decision to breach the law may well be influenced by party politics, partisan considerations or the personal interest of the government officer. There is equally an element of public interest in the courts having jurisdiction to grant mandatory orders against the executive to prevent situations where these improper factors could lead to a decision to override individual rights.

Another argument against the “public interest” justification is that mandatory relief is discretionary:⁴² even if the immunity were removed, the decision whether or not to grant a mandatory order against the executive would be at the court’s discretion. It is highly likely that a court would take the public interest and the government’s international obligations into account when deciding whether or not to grant mandatory relief. The need for a total immunity from mandatory orders is not established.

Harris suggests that the immunity “is possibly not a problem at all because of the Crown’s consistent record of complying voluntarily with declaratory orders from the courts.”⁴³ As the familiar refrain goes, “if not broken, why fix it?”

It is submitted that there are two reasons why declarations are inadequate substitutes for injunctions. First, it is uncertain whether interim declarations are available in every situation where a court would otherwise make a mandatory order; specifically, there is no statutory power to grant interim declarations in civil proceedings other than in judicial review. Section 15 of the Judicial Review Procedure Act 2016 provides that the courts can make interim declarations in lieu of an interim order of mandamus, prohibition or certiorari in judicial review proceedings.⁴⁴ However, there is no equivalent statutory provision under the Crown Proceeding Act 1950 to allow the grant of an interim declaration in civil proceedings.

⁴² *Gill v Attorney-General* [2010] NZCA 468 at [27]; see also Joseph, above n. 4,

⁴³ Harris, above n. 37, at 107.

⁴⁴ Previously, s 8 of the Judicature Amendment Act 1972 made a similar provision.

The common law position on interim declarations is ambivalent. The traditional position is that there is no such thing as an interim declaration of the law because the law cannot vary between the interlocutory and final hearings.⁴⁵ For example, the New Zealand High Court in *Codelfa-Cogefar (NZ) Ltd v Attorney-General* held that the plaintiff had no ability to obtain an interim declaration restraining the Crown from its alleged breach of contract until such time as a court or arbitrator decided whether a breach of contract had been proven.⁴⁶ The unavailability of interim declarations meant that plaintiffs were entirely unable to preserve their position pending a final determination in civil proceedings against the Crown. A declaration at a final hearing may well be too little, too late. More recent High Court decisions tend to accept that interim declarations are available in civil proceedings. In *Sportsworld Society Incorporated v Shanahan*,⁴⁷ Baragwanath J described the unavailability of interim declarations as an “anachronism”⁴⁸ and found “no policy reason or the courts to forsake the valuable tool of interim injunction”⁴⁹ given that Parliament had made these available in judicial review proceedings. *Coumat Ltd v Registrar General of Land*⁵⁰ also accepted that “an interim declaration can be made in appropriate circumstances.”⁵¹ However, the traditional common law position has not been overruled because there is no superior court ruling on this point. It remains legally open to High Court and District Court judges to follow *Codelfa-Cogefar* and the older decisions and disclaim jurisdiction to grant interim declarations against the Crown.

The non-binding nature of declarations is a further reason why they are an unsatisfactory substitute for mandatory orders. There is invariably an element of uncertainty regarding whether

⁴⁵ *Underhill v Ministry of Food* [1950] 1 All ER 591 at 593 *per* Romer J; *Meade v Haringey London Borough Council* [1970] 1 WLR 637 at 648 *per* Lord Denning MR; *Codelfa-Cogefar (NZ) Ltd v Attorney-General* [1980] 2 NZLR 153 at 162, *per* White J; *Fox v Douglas* HC Wellington CP90/88, 26 February 1988 (HC) at 12, *per* Eichelbaum J; *West Coast Regional Council v Attorney-General* (1994) 8 PRNZ 44 (HC) at 52, *per* Heron J.

⁴⁶ *Codelfa-Cogefar*, above n. 45, at 162.

⁴⁷ *Sportsworld Society Incorporated v Shanahan* HC Whangarei CIV-2004-488-720, 29 October 2004.

⁴⁸ At [11], *per* Baragwanath J.

⁴⁹ *Ibid.*

⁵⁰ *Coumat Ltd v Registrar General of Land* [2016] NZHC 1911.

⁵¹ At [33], *per* Gilbert J.

or not the Crown will comply with a declaration. In *M v Home Office*, a minister breached a court order precisely because he received legal advice that the court had no jurisdiction to make an order.⁵² The government's legal advisors would be all too aware of the non-enforceability of declarations when advising the government on the available courses of action. One suspects that the knowledge that the Crown is free to disregard declarations has ramifications for pre-trial negotiations between the plaintiff and the Crown. Even if the Crown were to indicate early on that it would comply with a declaration, this would appear to be a concession on the Crown's part rather than an enforceable obligation. For these reasons, the ability to make declarations is not an adequate substitute for the ability to make mandatory orders against the Crown.

A fourth justification for the Crown's immunity from mandatory orders is that the doctrine of separation of powers makes it inappropriate for one branch of government (the judiciary) to coerce another branch (the executive).⁵³ Cane notes that "it is said that it would upset the constitutional balance between the courts and the executive if the Crown could be held in contempt of court for disobeying a prerogative order of prohibition or mandamus."⁵⁴ Harris queries whether it is even possible for courts to compel the Crown's obedience through the mechanisms of enforcement at courts' disposal – namely, findings of contempt backed up with fines or imprisonment.⁵⁵ Fines would be paid for out of public funds, with little effect on individual officers or government departments.⁵⁶ Imprisonment is also likely to be inappropriate because of the difficulty in isolating the officer or officers responsible for the decision to disobey the injunction.⁵⁷ The absence of a feasible mechanism for enforcement gives rise to the argument that the power to issue mandatory orders would be meaningless. Cane writes, "At the end of the day, it may be that the strength of the courts must lie in the esteem they can command from

⁵² House of Lords in *M*, above n. 5; see discussion of the facts of *M* in Section 8.3.3.

⁵³ Harris, above n. 37, at 106; Hogg, Monahan and Wright, above n. 6, at 54.

⁵⁴ Peter Cane *An introduction to administrative law* (2nd ed, Clarendon Press, Oxford, 1992) at 64, quoted by Law Commission, above n. 18, at [18].

⁵⁵ Harris, above n. 37, at 106 – 107.

⁵⁶ At 107.

⁵⁷ At 106.

government and people rather than in the power to fine or imprison for disobedience of their orders.”⁵⁸

There is a hint of scare-mongering in these arguments. They evoke the worst-case scenario of a constitutional deadlock to make the very prospect of a mandatory order against the Crown appear dangerous. In reality, the risk of a deadlock is low: it is unlikely that an executive branch which habitually complies with declarations of law⁵⁹ would rebuff a court’s order directing it to comply with the law. The advantage of courts having the jurisdiction to grant mandatory orders is that it will remove the suggestion that compliance with the law is a convention rather than a legal requirement on the part of the executive.

It goes without saying that a deadlock between the courts and the executive would be highly undesirable and it is uncertain whether the courts would triumph by resorting to the enforcement mechanisms at their disposal. It is far more preferable for there to be a relationship of comity between the courts and the executive, pursuant to which the executive unfailingly follows court rulings and the court does not make mandatory orders that risk antagonising the executive. However, comity does not equate to denying the courts the jurisdiction to make mandatory orders; it equates to being able to rely on the courts not to make mandatory orders when it would be inappropriate to do so. The discretionary nature of mandatory relief already caters to this demand without any need for a blanket immunity.

Lastly, abolishing the immunity would make the analysis of executive liability markedly simpler. Section 8.3 of this chapter demonstrates the extent to which the Crown’s immunity from mandatory orders convolutes legal analysis of whether or not such orders may lie against officers of the Crown. The immunity necessitates reliance on the *persona designata* analysis, which artificially distinguishes between the Crown and the ministers who represent the Crown. A far

⁵⁸ Peter Cane *Administrative law* (5th ed, Oxford University Press, Oxford, 2011) at 303.

⁵⁹ Harris, above n. 37, at 107.

simpler and more coherent approach would be for the law to recognise that ministers in their official capacity *are* the Crown. But it is not possible to adopt this approach, as long as the Crown's immunity remains, without extending the immunity to its officers to the detriment of those litigating against the Crown.

The preceding discussion establishes that the executive's immunity from mandatory orders is unjustifiable as a matter of principle and having regard to its practical implications: it is inconsistent with the rule of law, disproportionate to the executive's functional needs and has an adverse impact on plaintiffs in proceedings against the Crown. While modern justifications have been proposed for the immunity, these justifications are overly broad and sweeping assertions that fail to withstand scrutiny. The New Zealand Government's defence of the immunity in face of the Law Commission's recommendations⁶⁰ smacks of inertia rather than a considered view of the immunity's need. The result is that an immunity that attached to the Sovereign in 17th century England continues to shield the Crown qua executive from mandatory orders in 21st century New Zealand.

8.3 Mandatory orders against officers of the Crown

The Crown's immunity from mandatory orders also extends to officers where the effect of enjoining the officer would be to enjoin the Crown. Section 17(2) of the Crown Proceedings Act 1950 (identically worded to s 21(2) of the 1947 Act) provides for Crown immunity in civil proceedings as follows:

The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which would not have been obtained in proceedings against the Crown.

⁶⁰ Government response, above n. 40, at 3.

Sections 17(2) and 21(2) prompt the question, to what extent does the Crown's immunity from injunctions and mandatory orders also apply to ministers of the Crown? In theory, the answer depends on whether one regards ministers as being the Crown or being distinct from the Crown. Logic dictates that ministers would enjoy any immunity attaching to the Crown if the Crown is a corporation aggregate comprising the Sovereign and the executive government. If, on the other hand, the Crown is a corporation sole denoting the Sovereign alone, the Crown's immunities do not necessarily attach to its ministers. Ironically, the corporation sole analogy therefore emerges as the more usable analogy if one is to avoid extending the ambit of executive immunity from mandatory orders.

In practice, courts have avoided a uniform answer to whether or not ministers are the Crown. Instead, they have resorted to analysing the capacity in which the minister is acting. Ministers who are exercising statutory powers may be subject to mandatory orders if they are acting in their personal capacity or if the statute vests the power in their office as minister by name (that is, *persona designata*); however, ministers are immune from mandamus if they are representing the Crown in exercising the statutory power. The difference between "ministers acting as ministers" and "ministers acting as the Crown" is uncertain, and some have questioned whether that difference even exists.⁶¹

It is submitted that these confusions exist for three reasons. First, many of these confusions originate in 19th century case law and courts have simply failed to discard the older lines of reasoning. Secondly, the confusions mask a deeper lack of understanding about the nature of the Crown – that is, whether it is a corporation aggregate which includes ministers or a corporation sole that denotes the Sovereign alone. Thirdly, the Crown's immunity from mandatory orders means that it is dangerous for courts to rule that the Crown includes ministers of the Crown, while the modern reality of government means that it is equally unpalatable to most courts to

⁶¹ *Merricks v Heathcote-Amory* [1955] Ch. 567 at 575, *per* Upjohn J; *Aratiki Honey v Ministry of Agriculture* [1979] 2 NZLR 311 at 314, *per* Jeffries J; *Bain v Minister of Justice* [2013] NZHC 2123 at [120] – [123], *per* Keane J.

insist that the Crown denotes the Sovereign alone. The Crown's immunity therefore hinders a clearer understanding of the legal personality of the Crown.

8.3.1. Conflicting historical authorities

Mandatory orders were never available against the Crown directly. Lord Denman CJ recognised this when he observed in *R v Powell* when he said that "there would be an incongruity in the Queen commanding herself to do an act."⁶²

The contentious question was whether ministers could be subject to mandatory orders. Case law pre-dating the Crown Proceedings Acts shows two conflicting lines of authorities on the question whether a minister of the Crown could be subject to mandamus without impugning the Crown's dignity. One set of decisions held that mandamus could lie against officers in their official capacity.⁶³ A parallel line of authorities ruled that mandamus was unavailable against officers in any capacity because they were agents of the Crown.⁶⁴ These contradictory positions are now explained.

The position that mandamus could lie against officers relied upon the justification that the duty lay on the officer rather than the Crown. In *R v Lords Commissioners of Treasury*, the Attorney-General argued on behalf of the defendants that it was "against principle that the Court should order a mandamus in the name of the King, directing the King to pay money."⁶⁵ The premise for this argument was that the Lords Commissioners of the Treasury represented the king because

⁶² *R v Powell*, above n. 10, at 721 and 725.

⁶³ *Rankin v Huskisson* (1830) 4 SIM 13; 58 Eng. Rep. 6; *Ellis v Earl Grey* (1833) 6 Sim 214; 58 Eng. Rep. 574; *R v Lords Commissioners of Treasury* (1835) 4 AD & E 284; 111 Eng. Rep. 794; *R v Lords of the Treasury* (1851) 16 QB 358; 117 Eng. Rep. 916; *R v Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313.

⁶⁴ *R v Commissioners of Woods and Forests, ex parte Budge* (1850) 15 QB 760; 117 Eng. Rep. 646; *R v Lords Commissioners of the Treasury* (1871), above n. 13; *R v Commissioners of Inland Revenue, in re Nathan* (1884) 12 QB 461.

⁶⁵ *Lords Commissioners of Treasury* (1835), above n. 63, at 796.

they were in charge of “the King’s treasure”⁶⁶ and therefore enjoyed the same immunity as the king himself. However, Lord Denman CJ dismissed this argument. His Lordship said:⁶⁷

[The Lords Commissioners of the Treasury] are officers under the Crown, but the Crown has no more to do with them, for this purpose, than with any other officers. They are merely parties who have received a sum of money as trustees for an individual, under the provisions of an Act of Parliament.

R v Commissioners for Special Purposes of the Income Tax used similar reasoning to allow mandamus against the defendant Commissioners.⁶⁸ The Court of Appeal ruled that the mandamus was “not to enforce payment of money by the Crown, but to enforce the making of an order by the Commissioners which it [was] the duty of the Commissioners to make.”⁶⁹

These cases distinguished between officers and the Crown on a different basis compared to the distinction in tort discussed in Section 7.3.2. In tort, damages were awarded against officers in their personal capacity because the courts equated the official capacity with the Crown.⁷⁰ By contrast, in mandamus, the courts openly targeted the official capacity. Most of the cases named the defendants as party by their office rather than by personal name.⁷¹ Some older cases listed the defendants as party by their personal names (such as “Huskisson” or “Earl Grey”) but even these cases expressed the Court’s order as lying against the officer rather than the person, that is, “the Commissioners of Woods and Forests”⁷² or “the Lords of the Treasury”.⁷³ There was no trace of the concern that enjoining the officers in their official capacity would amount to enjoining the Crown. Rather, the cases allowing mandamus turned on the reasoning that the duty

⁶⁶ Ibid.

⁶⁷ At 797.

⁶⁸ *Commissioners for Special Purposes of the Income Tax*, above n. 63.

⁶⁹ At 322.

⁷⁰ *Rogers v Rajendro Dutt* 13 Moore PC 207 at 236; *Tobin v R* (1864) 16 CB (NS) 310; 143 Eng. Rep. 1148 at 1167; *Feather v R* (1865) 6 B&B 257; 122 Eng. Rep. 1191 at 1205 – 6.

⁷¹ See footnote 63, above.

⁷² *Rankin*, above n. 63, at 7.

⁷³ *Ellis*, above n. 63, at 577.

attached to the office of the defendant rather than the Crown. The underlying assumption behind this approach was that the offices of government were not “the Crown”.

On the other hand, several decisions refused to order mandamus against Crown officers on the basis that such an order would amount to enjoining the Crown.⁷⁴ In *R v Lords Commissioners of the Treasury*, the Court of Queen’s Bench considered whether a statutory duty to apply certain funds applied to the Lords Commissioners of the Treasury as “servants of the Crown” or as “servants of Parliament”.⁷⁵ The Court ruled that the money had been voted by Parliament as a supply to the Crown and had only been paid to the Lords of the Treasury as servants of the Crown.⁷⁶ Cockburn CJ observed:⁷⁷

[W]hen a duty has to be performed (if I may use that expression) by the Crown, this Court [the Court of Queen’s Bench] cannot claim even in appearance to have any power to command the Crown; the thing is out of the question...In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction.

Again, in *In Re Nathan*, the Court of Appeal ruled that a sum of money was “not money paid to [the] commissioners in their own right, either officially or individually” but was “money paid to the Crown, and for the use of the Crown.”⁷⁸ Accordingly, the Commissioners of Inland Revenue were acting “merely as the servants and agents of the Crown”;⁷⁹ the statutory duty that they owed was to the Crown, and no mandamus could lie.⁸⁰

⁷⁴ See footnote 64, above.

⁷⁵ *Lords Commissioners of Treasury* (1871), above n. 13, at 394.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *In Re Nathan*, above n. 64, at 471, *per* Brett MR.

⁷⁹ *Ibid.*

⁸⁰ At 472.

The contrasting legal positions were difficult to reconcile. Brett MR and Bowen LJ in *In Re Nathan* attempted to overrule *R v Lords Commissioner of the Treasury*⁸¹ in a bid to solidify the position that mandamus could not be ordered against officers of the Crown. However, this failed to settle matters because five years later, Lindley LJ declined to follow *In Re Nathan* in another Court of Appeal decision.⁸² His Honour ended his judgment with the following observation:⁸³

It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile: but I think that the counsel for the applicants were right in saying that the application is not to enforce payment of money by the Crown, but to enforce the making of an order by the Commissioners, which it is the duty of the Commissioners to make.

Thus, the law remained inconsistent on whether the Crown's immunity from mandamus extended to its officers.

8.3.2. Three ministerial capacities

Section 21(2) of the Crown Proceedings Act 1947 (UK) and its New Zealand equivalent, s 17(2) of the Crown Proceedings Act 1950, have perpetuated the inconsistent lines of authority. The position that ministers could either act as the Crown or act as individuals in their official capacity has given way to three ministerial capacities: the official, the *persona designata* and the personal capacities. A number of cases starting in the 1950s found that ministers acting in their official capacity are immune under s 21(2) or s 17(2) because they are the same as the Crown.⁸⁴ Some cases kept open the possibility of mandatory orders against ministers by suggesting that ministers can be enjoined in their personal capacity under s 21(2) or s 17(2).⁸⁵ A conflicting line of English

⁸¹ At 476 and 480.

⁸² *Commissioners for Special Purposes of the Income Tax*, above n. 63, at 322.

⁸³ *Ibid.*

⁸⁴ *Harper v Secretary of State* [1955] 1 All ER 331; *Merricks*, above n. 61; *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85; *Aratiki*, above n. 61; see discussion in Section 8.3.2.2.

⁸⁵ *Merricks*, above n. 61; *Bird v Auckland District Land Registrar* [1952] NZLR 563; *Fiordland Venison Ltd v MacIntyre* [1979] 2 NZLR 318; *M v Home Office* [1992] 1 QB 271 (CA) ["Court of Appeal in *M*"]; see discussion in Section 8.3.2.4.

decisions have held that ministers are susceptible to mandatory orders in their official capacity because the subject of the order is the minister, not the Crown; these cases treat the minister as acting as *persona designata*.⁸⁶

The advantage of the *persona designata* analysis is that it narrows the extent of executive immunity under s 21(2) or s 17(2) to the Crown as an abstract concept and leaves ministers susceptible to injunctions. However, this analysis also enforces the corporation sole analogy on the Crown to the detriment of the Crown's conceptual coherence.⁸⁷ The position that ministers in their official capacity are the same as the Crown is better aligned with the corporation aggregate analogy but the Crown's immunity from mandatory orders means that it is untenable.

Some consider that *M v Home Office* has nullified the Crown qua executive's immunity from mandatory orders⁸⁸ but closer inspection of the decision shows that it is really only a reiteration of the *persona designata* analysis.⁸⁹ Accordingly, the question whether ministers are immune from mandatory orders remains a live issue and continues to complicate whether the Crown is a corporation sole or a corporation aggregate. The following sections explore these issues in greater depth.

8.3.2.1. Relevance to judicial review proceedings

At the outset, it should be clarified that courts use ministerial capacities to analyse the availability of mandatory orders against the executive in judicial review notwithstanding that s 21(2) and s 17(2) apply to "civil proceedings" and not to judicial review. Section 38 of the Crown Proceedings Act 1947 specifically excludes "proceedings on the Crown side of the King's Bench Division" from

⁸⁶ *Padfield v Minister of Agriculture Fisheries and Food* [1968] UKHL 1; *R v Home Secretary, ex parte Phansopkar* [1976] QB 606 (CA); *R v Secretary of State, ex parte Herbage* [1986] 3 All ER 210 (QBD); House of Lords in *M*, above n. 5.

⁸⁷ See discussion in 8.3.3.4.

⁸⁸ See Joseph, above n. 4, at 1154; Law Commission, above n. 18, at [10]; *Paul v Attorney-General* [2009] NZAR 405 at [25].

⁸⁹ See discussion in 8.3.3.4.

the definition of “civil proceedings”. Similarly, s 2 of the Crown Proceedings Act 1950 in New Zealand excludes “proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari or proceedings by way of an application for [judicial] review...” from the definition of “civil proceedings”.

However, courts have adopted a similar analysis for the availability of mandatory orders in both litigation and judicial review. English courts have on several occasions discussed the principle under s 21(2) when determining whether a mandatory order lies against a minister exercising out a statutory power.⁹⁰ In *M v Home Office*, the House of Lords considered the implication of s 21(2) while ruling on the validity of an injunction in a judicial review proceeding.⁹¹ New Zealand courts have also taken the language of s 17(2) into consideration in judicial review cases.⁹²

Several academics have also relied on the judicial review decision in *M v Home Office* as the answer to the question of whether mandatory orders are available against officers in civil proceedings under ss 21(2) and 17(2).⁹³ Accordingly, the ensuing sections consider cases from both civil proceedings and judicial review to consider how the analysis of ministerial capacities has affected the interpretation of s 21(2) and s 17(2).

8.3.2.2. Ministers are immune in their official capacity

A number of English cases after the enactment of the Crown Proceedings Act 1947 have held that ministers are immune from mandatory orders when acting officially. There are two issues with this proposition. First, it disables courts from enforcing appropriate remedies against ministers in their official capacity and undermines the rule of equality before the law. Secondly, these cases suggest that ministers can only be subject to mandatory orders in their personal capacity. This

⁹⁰ For example, see *Factortame*, above n. 84, at 705 – 706; House of Lords in *M*, above n. 5, at 410 onwards.

⁹¹ Ibid.

⁹² *Paul*, above n. 86, at [25] – [26]; *Russell v Commissioner of Inland Revenue* [2015] NZCA 351 at fn 14.

⁹³ For example, see William Wade “Crown, ministers and officials: legal status and liability” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 23 at 27; Joseph, above n. 4, at 1154; *Chitty on Contracts – Volume 1* (31st ed, Sweet & Maxwell, London, 2012) at 856.

overlooks the fact that the personal capacity was historically used only to explain liability in tort and never susceptibility to mandamus,⁹⁴ and that secondly, 19th century courts regularly held that ministers acting as individual ministers were susceptible to mandatory orders in their official capacity.⁹⁵

The case that initiated this error was *Harper v Secretary of State*.⁹⁶ The applicant, Harper, sought an order restraining the Home Secretary from progressing with a draft Order in Council which had received the approval of both Houses of Parliament. The application succeeded at the High Court⁹⁷ but then failed at the Court of Appeal.⁹⁸ The outcomes are not relevant to this analysis; however, excerpts from the two decisions are worth exploring because of the confusions they reveal about ministerial capacities and the Crown.

Roxburgh J at the High Court ruled that the Home Secretary enjoyed immunity in his official capacity because of s 21(2) of the Crown Proceedings Act. His Honour distinguished between the minister's "general capacity as Secretary of State" (by which, it is inferred that he meant the minister's representative capacity as a minister of the Crown) from his capacity "as a person to whom the duty of so doing is expressly delegated by the provisions of this Act".⁹⁹ In the latter case, Roxburgh J felt that the immunity under the Crown Proceedings Act would not have "any bearing".¹⁰⁰ Similarly, Evershed J at the Court of Appeal considered that if the action against the Minister was "in his capacity as Secretary of State...[he was] not satisfied...that the case is one which, having regard to the terms of the Crown Proceedings Act, 1947, will lie."¹⁰¹ His Honour

⁹⁴ See Section 7.3.2.

⁹⁵ See Section 8.3.1.

⁹⁶ *Harper*, above n. 84.

⁹⁷ *Harper v Secretary of State* High Court decision, reported in *The Times*, 18 December 1954; discussed in *Merricks*, above n. 61, at 574; S A de Smith "Boundaries between Parliament and the courts" (1955) 18(3) *Modern Law Review* 281 at 283.

⁹⁸ *Harper*, above n. 84.

⁹⁹ *Harper*, above n. 97, quoted in *Merricks*, above n. 61, at 574.

¹⁰⁰ *Ibid.*

¹⁰¹ *Harper*, above n. 84, at 254.

was also “not satisfied that [the applicant] ought not to sue [the Secretary of State] in his personal capacity as for an ordinary wrong...”¹⁰²

Their Honours’ references to the minister acting as “a person” or in a “personal capacity” were a misappropriation of the “personal capacity” in which ministers were historically liable in tort.¹⁰³ The correct reference would have been to the *persona designata* capacity in the context of mandatory orders; this was an official capacity as an individual officer, not a personal one. The two parallel lines of 19th century judgments on whether mandamus was available against an officer of the Crown would have justified drawing a distinction between ministers enjoying immunity in their official capacity as the Crown as opposed to ministers not enjoying immunity when acting *persona designata*.¹⁰⁴ However, their Honours mistakenly proposed that ministers were either immune if acting officially or not immune if acting personally. This inadvertently undermined the *persona designata* capacity.

The next case affirming officers’ immunity in their official capacity and further undermining the *persona designata* capacity was *Merricks v Heathcoat-Amory*.¹⁰⁵ The plaintiff in this case sought to obtain an injunction to prevent the Minister of Agriculture, Fisheries and Food from introducing a draft scheme to Parliament. The Agricultural Marketing Act 1931 provided the Minister’s powers to present the draft scheme. The plaintiff applied for the injunction against the Minister in both, his personal capacity (that is, as Mr Heathcoat-Amory) and his official capacity. It is clear that the plaintiff was mindful of the line of 19th century authorities where ministers acting *persona designata* were subjected to mandamus; he therefore argued that while the Minister was acting officially, he was acting as a “person designated in an official capacity but not representing the Crown.”¹⁰⁶

¹⁰² Ibid.

¹⁰³ See Section 7.3.2.

¹⁰⁴ See Section 8.3.1.

¹⁰⁵ *Merricks*, above n. 61.

¹⁰⁶ At 572.

Upjohn J in the Chancery Division of the High Court declined the injunction as the Minister was “carrying out his functions under [the relevant sections of the 1931 legislation]” and “acting as a representative or as an officer of the Crown.”¹⁰⁷ His Honour then discussed the three capacities in which the Minister could act as follows:¹⁰⁸

I am not satisfied that it is possible to have the three categories which were suggested. Of course there can be an official representing the Crown, that is plainly this case. But if he were not, it was said that he was a person designated in an official capacity but not representing the Crown. The third suggestion was that his capacity was purely that of an individual. I understand the conception of the first and the third categories, but I confess to finding it difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification.

In short, his Honour accepted an officer’s official and personal capacities but rejected *persona designata*.

There were two concerns with Upjohn J’s reasoning. First, his Honour did not take into account that courts had previously accepted that ministers acting in their official capacity were susceptible to mandamus.¹⁰⁹ Rather, courts had not recognised that a minister could be enjoined in his personal capacity in applications for mandamus; the personal capacity appeared only in the context of tort liability. Upjohn J was departing from precedents when he accepted the personal capacity but rejected *persona designata*. Secondly, his Honour’s view that a minister acting under

¹⁰⁷ At 575.

¹⁰⁸ At 575 – 576.

¹⁰⁹ *Rankin*, above n. 63, *Ellis*, above n. 63, *Lords Commissioners of Treasury* (1835), above n. 63, *Lords of the Treasury* (1851), above n. 63, *Commissioners for Special Purposes of the Income Tax*, above n. 63.

a statutory duty was “usually”¹¹⁰ acting in his official capacity practically ruled out any possibility that a minister could be subject to mandamus in his personal capacity except when liable for a tort. This left potential applicants for mandamus in a hapless position: how could they compel a minister to perform a statutory duty when a statute would only ever entrust a function to a minister as “minister”, and not as “Mr Heathcoat-Amory”? His Honour might as well never have recognised the personal capacity in judicial review and conceded that a minister could never be enjoined to perform a statutory duty by virtue of s 21(2).

The view that ministers in their official capacity enjoyed immunity from mandatory orders received the House of Lords’ unanimous approval in *Factortame Limited v Secretary of State*.¹¹¹ Lord Bridge in his leading judgment asserted that Crown officers’ immunity from mandamus was “entirely with the position in law before 1947”.¹¹² This indicates that their Lordships’ view was at least partly *in curiam*; as shown above, 19th century cases had been evenly balanced for and against holding Crown officers immune. Their Lordships’ interpretation of s 21(2) uniformly expanded the scope of executive immunity from the Crown to its ministers.

The same problematic reasoning inflicted New Zealand law in the context of discovery orders against ministers of the Crown in judicial review cases. In *Arataki Honey Ltd v Minister of Agriculture*,¹¹³ the applicant sought a discovery order against the Minister in a judicial review proceeding. Jeffries J declined the application for discovery order. His Honour adopted *Merrick v Heathcoat-Amory* to hold that the Minister was acting officially, and thus it was the interests of the Crown at stake, and a discovery order was unavailable against the Minister.¹¹⁴

¹¹⁰ *Merricks*, above n. 61, at 576.

¹¹¹ *Factortame*, above n. 84.

¹¹² At 707.

¹¹³ *Arataki*, above n. 61.

¹¹⁴ At 313 – 314 and 317.

*Mohammed v Minister of Immigration*¹¹⁵ also involved an application for discovery against a Minister and came to the same conclusion as *Aratiki* but on the basis of far more incoherent reasoning. The applicant had initially issued proceedings against the Attorney-General as first respondent and the Minister as second defendant. However, the proceeding was then amended to remove the Attorney-General as a party because:¹¹⁶

[The applicant] had no direct cause of action against the Crown as such and...it was therefore inappropriate to cite the Attorney-General as a respondent, and...it would be proper to cite the Minister of Immigration in his capacity as such.

This reasoning indicated that the Minister was distinct from the Crown since the proceeding for discovery could be maintained against a Minister but not the Crown. Yet Barker J declined the application for discovery against the Minister by holding that he “must decline to order discovery against the Crown”.¹¹⁷ Joseph describes the reasoning as “curious[]”¹¹⁸ – an understatement given the Court’s self-contradictory findings that the Minister and Crown were distinct and yet an order against the Minister amounted to an order against the Crown. The judgment implies deep-seated confusion surrounding what the Crown is and whether or not a minister is the Crown.

Mohammed is illogical to the point of an aberration: there is, admittedly, logical strength in the position in cases such as *Merricks* and *Aratiki* that ministers are the same as the Crown in their official capacity. A legal artifice such as the Crown can only act through its ministers and other officers. Ministers carry out the business of executive government regardless of whether a statute empowers them directly to carry out an executive function or vests the function in the executive government as a whole. It is logical to hold that ministers in their official capacity are

¹¹⁵ *Mohammed v Minister of Immigration* [1979] 2 NZLR 321.

¹¹⁶ At 321.

¹¹⁷ At 323.

¹¹⁸ Joseph, above n. 4, at 1154.

representing the Crown. Equating the official capacity with the Crown also strengthens the corporation aggregate analogy that the Crown comprises the apparatus of government and does not denote just the Sovereign.¹¹⁹ However, the downside of the interpretation is that it leads to courts effectively renouncing their coercive powers against ministers: courts cannot order ministers if ministers are the Crown because that would offend the Crown's immunity from mandatory orders.

8.3.2.3. No immunity when acting *persona designata*

An alternative line of reasoning that allows ministers to be enjoined notwithstanding the immunity from mandatory orders is that ministers acting as *persona designata* are not the Crown and are susceptible to mandatory orders. Several cases after the enactment of s 21(2) granted mandamus against ministers but without discussing the effect of the Crown's immunity from mandatory orders.¹²⁰ The first significant judicial discussion of how mandamus was available notwithstanding s 21(2) was in *R v Secretary of State, ex parte Herbage*.¹²¹ The case arose from an application for mandamus and mandatory injunction against the governor of a prison and the Secretary of State of the Home Department. Hodgson J declined the application but considered that, had the facts warranted the orders sought, the Court would have had jurisdiction to grant the orders. His Honour stated:¹²²

Of course the prerogative orders lie against officers of the Crown including ministers, save where the Crown's servant is merely the instrument selected by the Crown for the discharge of the Crown's own duty... But in nearly every case mandamus will lie against a minister or department...

¹¹⁹ See Section 4.6.

¹²⁰ *Padfield*, above n. 86, *Phansopkar*, above n. 86.

¹²¹ *Herbage*, above n. 96.

¹²² At 212 – 213.

Put another way, where Parliament imposes a duty on someone acting in a particular capacity, mandamus will lie notwithstanding that he is a servant of the Crown and acting on the Crown's behalf...

This understanding evokes the opinion in *R v Lords Commissioners of the Treasury* that “the Crown has no more to do with [the Commissioners – or in this case, the Secretary of State] for this purpose than with any other officers...”¹²³ The effect is to hold that the Crown is distinct from its ministers – that the Crown denotes the Sovereign as a corporation sole and that ministers are her servants.

Hodgson J's reasoning drew from the work of eminent public law academic Sir William Wade.¹²⁴ Wade was a long-standing champion of the corporation sole analogy and the distinction between the Crown and ministers as a means of preventing s 21(2) from immunising ministers. He argued that there has always been a “vital legal distinction between Crown and servants”:¹²⁵ “[t]he King has immunity – his secretaries do not”.¹²⁶ Wade considered it trite to the point of being a “platitude” that “Ministers and Crown servants, being subject to the full range of legal remedies, can be compelled to obey the law.”¹²⁷ He rebuffed the notion that s 21(2) altered this position:

128

...[T]he policy of the Crown Proceedings Act... was to abolish large areas of Crown immunity but not to create new immunities for Crown servants. The extension of immunities would “run wholly counter to its spirit” ...

¹²³ *Lords Commissioners of Treasury* (1835), above n. 63, at 797, per Lord Denman CJ.

¹²⁴ In *Herbage*, above n. 96, at 212 – 213, Hodgson J cited William Wade *Administrative law* (5th ed, Oxford University Press, London, 1982) at 645.

¹²⁵ William Wade “The Crown – old platitudes and new heresies” (1992) 142 NLJ 1275 at 1276.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ At 1315.

It was an “heresy” in Wade’s view that ministers of the Crown should be identified with the Crown when the obvious consequence was that it would extend the immunities attaching to the Crown to ministers.¹²⁹ The Crown could only denote the Sovereign as a corporation sole.¹³⁰

Wade considered that s 21(2) only prevented a mandatory order against a minister when a statute vested a power directly in the Crown and a minister happened to be exercising that power. He gave the example of s 2(2) of the European Communities Act 1972,¹³¹ which provided that “Her Majesty may by Order in Council” make certain provisions. In that situation, the effect of granting injunctive relief against a minister who initiated an Order in Council would be to grant the relief against the Crown. Otherwise, where a statute vests a power in a minister as *persona designata* (for example, the Minister for Transport), there was nothing in s 21(2) to prevent a mandatory order against the minister exercising the power.

The effect of this interpretation was significantly to narrow the ambit of executive immunity. The prevalent drafting practice is to vest powers in ministers as *persona designata*; it is rare for a statute to vest the Crown directly with a power.¹³² Accordingly, to hold that ministers exercising powers *persona designata* are subject to mandatory orders is to enable individuals to obtain remedies against the executive in the majority of case.

Wade’s championing of the *persona designata* capacity is, however, susceptible to several criticisms. The first is that the *persona designata* analysis only succeeds in exposing ministers to mandamus because the prevalent drafting practice is to vest the power in the minister rather than the Crown. Adler points out that it is easy for legislators “to circumvent the possibility of

¹²⁹ At 1275.

¹³⁰ At 1275 – 1276.

¹³¹ Wade, above n. 93, at 28.

¹³² Wade, above n. 125, at 1276, citing FW Maitland *The Constitutional History of England* (Cambridge University Press, London, 1919) at 100.

interim relief”¹³³ by vesting a power in the Crown; this would re-invoke the bar under s 21(2) against enjoining officers when the effect is to enjoin the Crown.

Secondly, the distinction that Wade makes between powers of the Crown and powers given to ministers carves out a larger exception to the rule of law than Wade seems to have anticipated. By definition, prerogatives belong to the Crown and are only exercised by ministers on the Crown’s behalf.¹³⁴ Accordingly, courts would not be able to enjoin a minister when exercising a prerogative.¹³⁵ Further, no injunction would ever be available against a minister or department to enforce a contract, because the contract is entered into on the Crown’s behalf, not the individual minister.¹³⁶ This appears to be the position in New Zealand under s 17 of the New Zealand legislation: in *Codelfa-Cogefar v Attorney-General*,¹³⁷ White J ruled that a contract with a Department of State was a contract with the Crown and thus injunctive relief was not available against the Department. His Honour wrote:

In considering the Crown’s position regarding its relationship, through a Department of State, entering into a contract with a private company it seems to me that the Court’s duty remains to apply s 17.

Therefore, the *persona designata* analysis is only of limited use in making mandatory orders available against the executive.

¹³³ John Adler “Interim relief against the Crown” (1987) 50(1) Modern Law Review 105 at 108; see also Martin Loughlin’s similar criticism in Martin Loughlin “The State, the Crown and the law” in Maurice Sunkin and Sebastian Payne *The nature of the Crown* (Oxford University Press, Oxford, 1999) 33 at 72.

¹³⁴ Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand* (Auckland University Press, Auckland, 2017) at 39.

¹³⁵ Adler, above n. 133, at 108.

¹³⁶ Janet McLean “The Crown in contract and administrative law” (2004) 24(1) OJLS 129 at 136 – 139.

¹³⁷ *Codelfa*, above n. 45, at 162.

Thirdly, Wade is guilty of distorting history by asserting that “all previous judicial authority was in favour of a corporation sole”.¹³⁸ As discussed earlier, the Crown was conceived as a composite entity akin to a corporation aggregate before it became a corporation sole through a conceptual error that confused the separate notions of *universitas* and *dignitas*.¹³⁹ Conceiving the Crown as a corporation aggregate is therefore not such an aberration as he makes out. Moreover, Wade ignores the line of 19th century cases which refused to grant mandamus against ministers on the basis that they were representing the Crown.¹⁴⁰ These cases do not support his argument for the *persona designata* analysis. It is perhaps possible to explain these cases consistently with Wade’s assertion as instances where the power belonged to the Crown rather than the minister; however, as Linley LJ said in *Queen v Commissioners for Special Purposes of the Income Tax*, it was “difficult to draw the line”¹⁴¹ between the cases where the subject of mandamus was (rightly) the ministers and those where the subject would be (impermissibly) the Crown.

Fourthly, the *persona designata* analysis is highly artificial in that it presupposes the corporation sole analogy of the Crown and relies on a distinction between the Crown and its ministers. Wade acknowledges the artificiality¹⁴² but does not address it further. The difference between ministers acting as ministers and ministers acting as the Crown is tenuous. In both instances, it is the “executive” that is acting. Given that the Crown can only act through its ministers, it makes perfect sense to interpret the statutory duty on a minister as one that is in fact the Crown’s; it is a duty imposed on the executive that is simply being carried out by a specified minister. Upjohn J astutely recognised this in *Merricks* when he took issue with the *persona designata* capacity and said that “where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the

¹³⁸ Wade, above n. 93, at 24.

¹³⁹ See Chapter 4.

¹⁴⁰ *ex parte Budge*, above n. 64; *Lords Commissioners of the Treasury* (1871), above n. 13; *in re Nathan*, above n. 64.

¹⁴¹ *Commissioners for Special Purposes*, above n. 63, at 322.

¹⁴² Wade, above n. 125, at 1276.

Crown, or is acting in his personal capacity, usually the former.”¹⁴³ The “middle classification”¹⁴⁴ – *persona designata* – made little sense. Upjohn J’s analysis has academic support: Adler remarks that *Merricks* “embodies a more realistic constitutional position”.¹⁴⁵

Nonetheless, the downside of the constitutional realism is that s 21(2) bars mandatory orders against ministers if they are treated as the Crown, thereby reducing the litigant or applicant’s ability to obtain a remedy against the executive. Wade’s criticism of decisions such as *Merrick* and *Factortame*¹⁴⁶ is likely to be based on policy at heart even though he couches his criticism, somewhat disingenuously, as a deviation from precedents.

8.3.2.4. Orders available against ministers personally

*Harper*¹⁴⁷ and *Merricks*¹⁴⁸ suggested that ministers are subject to mandatory orders in their personal capacity without courts encountering the (apparent) bar under s 21(2) of the Crown Proceedings Act 1947. This would appear to mitigate the harshness of the rule that no order may lie against ministers in their official capacity. Not so: New Zealand courts have toyed with the personal capacity in several cases but not found that a minister has acted in a personal capacity on the facts.

The first of these cases was *Bird v Auckland District Land Registrar*.¹⁴⁹ The applicant alleged, among other things, that the Minister of Lands had exceeded his statutory power under the Servicemen’s Settlement Act 1950 and sought an injunction restraining the Minister from applying for the cancellation of a certificate of title and oust the applicant from his occupation of the land.¹⁵⁰ The subject-matter of the case was an application for an order of discovery directed

¹⁴³ *Merricks*, above n. 61, at 575 – 576.

¹⁴⁴ At 575.

¹⁴⁵ Adler, above n. 133, at 108.

¹⁴⁶ *Factortame*, above n. 84.

¹⁴⁷ *Harper*, above n. 84, at 254.

¹⁴⁸ *Merricks*, above n. 61, at 575 – 576.

¹⁴⁹ *Bird*, above n. 85.

¹⁵⁰ At 464 – 465.

against the Minister of Lands under s 27 of the Crown Proceedings Act 1950. Section 27 of the Act allows discovery orders against the Crown in civil proceedings as if the Crown were a private person of full age and capacity.

Adams J declined to grant the order on the basis that discovery orders under s 27 are only available against the Crown when the proceedings have been instituted against the correct representative of the Crown in accordance with s 14 of the Act. In this instance, the Minister did not represent the Crown. The proceeding sought to restrain the minister from exceeding his statutory power. In his Honour's view, "[p]roceedings to restrain an officer of the Crown personally from doing a wrongful act are not proceedings against the Crown."¹⁵¹ Accordingly, his Honour considered that "from the technical point of view, the present proceedings are not proceedings against the Crown, but are proceedings against the Minister personally."¹⁵² Accordingly, the order under s 27 was unavailable. Thus far, Adams J's logic is consistent, albeit it assumes that the Minister and the Crown are distinct and is contrary to the line of authorities that held that ministers act as the Crown in their official capacity.

Subsequently, however, his Honour's reasoning becomes questionable. Despite holding that the proceeding was against the Minister personally, his Honour determined that the Minister had "no personal interest" in the proceeding and that "there can be no doubt that the Minister has acted throughout...in his official capacity, and that it is the rights or interests of the Crown, and not of the Minister, that are really at stake."¹⁵³ Adams J considered the Minister's position to be "so closely analogous to that of the Crown itself"¹⁵⁴ that an order of discovery of documents could not be made under R 161A of the Code of Civil Procedure as such an order could not be

¹⁵¹ At 466.

¹⁵² Ibid.

¹⁵³ At 467.

¹⁵⁴ At 468 – 469.

made against the Crown. Ultimately, it was “the right of the Crown that is in issue”¹⁵⁵ and no order could be made against the Minister.

The reasoning is self-contradictory. Adams J declined the application for discovery because the Minister was the wrong defendant – the correct defendant being the Crown – and yet reasoned that granting a discovery order against the Minister would affect the rights of the Crown. His Honour at once held that the Minister did not represent the Crown in the proceeding (that is, the proceeding was against the Minister “personally”) and also that the Minister and the Crown were effectively the same. One has to agree with Adams J to the extent that the Minister had acted in his official rather than as he had “no personal interest”;¹⁵⁶ however, that raises the question why His Honour described the proceeding as being against the minister personally in the first place.

The logical inconsistency in *Bird* would once again cloud judicial reasoning in *Fiordland Venison Ltd v MacIntyre*.¹⁵⁷ The case arose from an application for a discovery order against the Minister of Agriculture and Fisheries in the course of a judicial review proceeding. The applicant sought the order against the Minister in his personal capacity, as “MacIntyre”, as the provision for discovery against the Crown under s 27 of the Crown Proceedings Act 1950 did not apply to judicial review proceedings. O’Regan J acknowledged that a person in the applicant’s position “has no alternative but to institute his proceedings against the Minister in his own name” because no order for discovery was available against the Crown in judicial review.¹⁵⁸ Yet his Honour evoked *Bird* to hold that the Minister could only be held to have been acting in his official capacity so that the interests involved were that of the Crown and no discovery order was available outside s 27. His Honour wrote:¹⁵⁹

¹⁵⁵ At 469.

¹⁵⁶ At 467.

¹⁵⁷ *MacIntyre*, above n. 85.

¹⁵⁸ At 318.

¹⁵⁹ At 319.

[I]f and when the Minister is...proceeded against [in his personal capacity] are the interests of the Crown at stake to such an extent to render applicable the special statutory provisions and the rules of the Code of Civil Procedure as to discovery? I answer in the affirmative.

This decision demonstrates the same confusion as *Bird* and *Mohammed v Minister of Immigration* (discussed above)¹⁶⁰ around whether the Minister and the Crown are the same or distinct. It is patent in both *Bird* and *Fiordland Venison* that the courts could find no practical distinction between the Crown and the ministers. Yet the courts insisted in holding that the ministers could not represent the Crown in each case.

A rare occasion where a court upheld a minister's liability to mandatory orders in his personal capacity the Court of Appeal's judgment in *M v Home Office*.¹⁶¹ The decision no longer stands following the House of Lord's ruling in *M* but it is worth exploring because it illustrates the fallacy of targeting ministers' personal capacity as a way of circumventing the Crown's immunity.

The issue in *M* was whether the Home Secretary had acted in contempt of court by breaching a court order. Simon Brown J at the Queen's Bench declined to find contempt on the ground that an injunction order against a minister could not have been valid in the first place.¹⁶² On appeal, the Court of Appeal overturned the High Court's judgment, with McCowan LJ dissenting. Lord Donaldson MR, delivering the leading judgment, reasoned that ministers and civil servants are "natural persons having a legal personality" and "[t]he obstacles to liability in contempt which arise in the case of "the Crown" and government departments do not therefore arise in their case."¹⁶³ His Lordship considered that ministers "like any other citizen, are subject to the law, the rule of law and the full jurisdiction of the courts."¹⁶⁴ Therefore, in principle, ministers and civil servants can be liable for contempt of court "in respect of acts or omissions by them personally

¹⁶⁰ *Mohammed*, above n. 115.

¹⁶¹ Court of Appeal in *M*, above n. 85.

¹⁶² At 284 – 285.

¹⁶³ At 302.

¹⁶⁴ *Ibid*.

and...it is no defence that ...[it] was committed in discharge or purported discharge of their official duties.”¹⁶⁵ Lord Donaldson MR concluded that “Mr Kenneth, as Home Secretary, was in contempt of court by reason of his personal decision [to breach the court order].”¹⁶⁶

The finding of contempt against a minister for breach of court order was a welcome confirmation of the executive’s obligation to obey court orders. However, it is difficult to justify a finding of contempt against the Home Secretary personally when the actions that gave rise to the Court making a mandatory order and subsequently finding a breach of that order were part of his official functions as Home Secretary. There was no suggestion that the Home Secretary had been motivated by personal considerations in his actions. Indeed, he had decided to breach the court order after receiving legal advice, as Home Secretary, that a court could not make a mandatory order against the government.¹⁶⁷ Logic demanded a finding of contempt against the Home Secretary in his official capacity.

The impediments to finding the Home Secretary to be in contempt were the unstated assumptions that, first, the Crown was the same as its ministers in their official capacity, and secondly, that ministers therefore enjoyed the same immunities as the Crown. Each assumption merits further scrutiny.

The Court’s assumption that ministers acting officially are the Crown is logically sound and more consonant with reality: it is consistent with the corporation aggregate analogy and recognises that the modern executive denotes ministerial government rather than the Sovereign. However, their Honours did not turn their minds to the alternative of the *persona designata* analysis that Hodgson J recognised in *Herbage*,¹⁶⁸ which could have supported a finding that the Home Secretary could be in contempt in his official capacity without any finding of contempt on the

¹⁶⁵ At 304.

¹⁶⁶ At 308.

¹⁶⁷ At 306.

¹⁶⁸ *Herbage*, above n. 96.

Crown's part. The failure to consider the *persona designata* capacity indicates the uncertainty surrounding the correct legal analysis of the Crown's nature. It is also possible that the artificiality of the *persona designata* analysis makes it less intuitive and easier to overlook.

The second assumption – that ministers enjoy the Crown's immunities – meant that a finding of contempt against the Home Secretary would result in the insupportable proposition that the Crown was in contempt of court. As McCowan LJ succinctly observed in his dissenting judgment, “the Secretary of State was in the present case performing a function of the Crown, which is not itself amenable to contempt, and, in relation to such a function, there is no distinction between the Crown and the Secretary of State.”¹⁶⁹ Having failed to consider the *persona designata* analysis, the only way for the majority of the Court of Appeal to make a finding of contempt against the Home Secretary was to make that finding against him personally.

The finding of contempt by the Court of Appeal was therefore a triumph of policy over logical clarity. McCowan LJ's reasoning is considerably more coherent than the majority's. The problem with McCowan LJ's approach is that the Crown's immunity from mandatory orders. But for this immunity, there would have been no difficulty with the line of reasoning in *Merricks*,¹⁷⁰ *Factortame*¹⁷¹ or with McCowan LJ's dissent in *M*: the courts could have held the Crown to be in contempt as a result of the Home Secretary's breach of the Court order.

The preceding analysis of the three ministerial capacities – the official, *persona designata* and personal capacities – reveals that the most logical position is that the Crown is the same as its ministers acting in their official capacity. However, the Crown's immunity from mandatory orders necessitates reliance on the *persona designata* and personal capacities because of the pragmatic need to give individuals enforceable remedies against the executive.

¹⁶⁹ Court of Appeal in *M*, above n. 85, at 310, *per* McCowan LJ.

¹⁷⁰ *Merricks*, above n. 61.

¹⁷¹ *Factortame*, above n. 84.

8.3.3. *M v Home Office*: a “solution”¹⁷²?

Several commentators consider that the House of Lords’ decision in *M v Home Office* has resolved the issues surrounding the availability of mandatory orders against ministers.¹⁷³ This section challenges that view by showing that *M* leaves untouched the confusions surrounding the relationship between the Crown and the various ministerial capacities and fails to clarify whether the Crown is a corporation aggregate or a corporation sole. Cases since *M* have continued to treat the concept of the Crown in inconsistent ways, showing that *M* has not had an edifying impact on the law.¹⁷⁴

8.3.3.1. Facts of *M*

M, a national of Zaire, had landed illegally in the United Kingdom and sought political asylum.¹⁷⁵ The Home Office declined his application and arranged for him to be deported back to Zaire. *M* applied for judicial review of the Home Office’s decision. For a variety of reasons, the hearing for his application took place on the date that he was supposed to be deported. The Home Office gave an undertaking before Garland J in the Queen’s Bench that *M* would not be deported until the Court had heard his case. However, *M* was in fact deported in accordance with the original arrangements.

Upon learning of this development, Garland J issued a mandatory interim order requiring the Home Secretary to immediately return *M* to the United Kingdom pending the Court’s consideration of his application. However, the Home Secretary, Mr Kenneth Baker, received legal advice to the effect that the Court has no jurisdiction to issue a mandatory order against the

¹⁷² Joseph, above n. 4, at 1154.

¹⁷³ Ibid; see also Law Commission, above n. 18, at [10]; Paul, above n. 88, at [25]; Hogg, Monahan and Wright, above n. 6, at 49;

¹⁷⁴ Bain, above n. 61; *Burrows v Police* [2018] NZHC 2088.

¹⁷⁵ For a discussion of the facts, see House of Lords in *M*, above n. 5, at 397 – 402; Stephen Sedley “The Crown in its own courts” in Christopher Forsyth and Ivan Hare (eds) *The golden metwand and the crooked cord* (Oxford University Press, Oxford, 1998) 253 at 254 – 255; Carol Harlow “Accidental loss of an asylum seeker” (1994) 57(4) *Modern Law Review* 620 at 620.

Crown and accordingly cancelled arrangements for M's return. The Home Office then applied for the order to be set aside and Garland J did so, saying that he was persuaded that he lacked jurisdiction to make the order. Subsequently, M's lawyers brought proceedings on his behalf to have the Home Office and Home Secretary fined for contempt of court for breaching Garland J's initial mandatory interim order.

8.3.3.2. At the High Court and Court of Appeal

At the High Court, Simon Brown J declined the application on the basis that the Court lacked jurisdiction to find the Home Office or the Home Secretary to be in contempt of court. His Honour considered that he would have found contempt had such a finding been within his power.¹⁷⁶ Insofar as the constitutional implications on executive accountability were concerned, Simon Brown J stated:¹⁷⁷

The court is not abrogating an historical responsibility for the control of the executive government. Rather, it is recognising that when it comes to the enforcement of its decisions the relationship between the executive and the judiciary must, in the end, be one of trust...[I]f [the Crown] fails to observe [its legal obligations] – it will be answerable to Parliament. It is not, then, given to the courts to exercise the power of punishment...[To do so] would be to shift the accepted constitutional balance between the executive and the judiciary..."

One may observe that Simon Brown J describes the Crown as "answerable to Parliament" but overlooks the fact that executive accountability to Parliament is about scrutiny rather than adherence to the rule of law. It is for the courts to enforce the law. His Honour's approach is therefore susceptible to criticisms of the very abrogation of responsibility that he seeks to pre-empt.

¹⁷⁶ Cited in Court of Appeal in *M*, above n. 85, at 297, *per* Lord Donaldson MR; House of Lords in *M*, above n. 5, at 403, *per* Lord Woolf.

¹⁷⁷ Quoted by Court of Appeal in *M*, above n. 85, at 284.

The Court of Appeal upheld the appeal by M's lawyers in part. The majority's view that the Home Secretary had been in contempt of court in his personal capacity has been discussed above.¹⁷⁸ Additionally, the majority found that the Queen's Bench was a court of unlimited jurisdiction and could make any order that was not illegal.¹⁷⁹ That the House of Lords in *Factortame* had ruled that interim orders were unavailable against the Crown did not mean that the order was illegal, albeit it was irregular.¹⁸⁰ Such an order is valid until it is set aside. Thus, the Home Secretary's decision to cancel the arrangements for M's return at a time when the interim order was still operative was in breach of the order.

8.3.3.3. At the House of Lords

The House of Lords unanimously dismissed the appeal by the Home Office.¹⁸¹ Lord Woolf delivered the leading judgment; Lord Griffiths, Lord Browne-Wilkinson and Lord Keith concurred with Lord Woolf without providing further reasons. Lord Templeman gave a separate concurring judgment.

Lord Templeman's judgment is palpably more succinct and forthright in its treatment of the Crown as the modern executive compared to Lord Woolf's judgment. Wade aptly describes the former as "shorter and incisive" and the latter as "longer and decisive".¹⁸² Lord Templeman started the judgment with the following remarks:¹⁸³

The expression "the Crown" has two meanings: namely the monarch and the executive...The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown.

¹⁷⁸ At 305, *per* Lord Donaldson MR.

¹⁷⁹ At 299.

¹⁸⁰ *Ibid.*

¹⁸¹ House of Lords in *M*, above n. 5.

¹⁸² Wade, above n. 93, at 28

¹⁸³ House of Lords in *M*, above n. 5, at 395.

This was a refreshing revision of the judicial position until then that the Crown could do no wrong, regardless of whether the context made it obvious that the Crown denoted the executive instead of the Sovereign.

Lord Templeman demonstrated similar conceptual clarity when addressing whether a minister is personally or officially liable for contempt. His Lordship stated: ¹⁸⁴

If the minister has personally broken the law, the litigant can sue the minister...in his personal capacity. For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court.

His Lordship justified the availability of injunctions and contempt orders against the Crown on political reality and constitutional ideals. It would “reverse the result of the Civil War”¹⁸⁵ if one were to hold “that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity”, as that would imply “that the executive obey the law as a matter of grace and not as a matter of necessity.”¹⁸⁶

The principles on which Lord Templeman made the decision are difficult to resist. However, the drawback is that, unlike Lord Woolf, Lord Templeman did not engage with the legal complexities of s 21(2) or the long line of decisions to the contrary.

Thus it is Lord Woolf’s judgment that receives more prominence. Lord Woolf recognised that historically, ministers were personally liable in civil proceedings but the Crown was immune from

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

a finding of wrong.¹⁸⁷ By contrast, in proceedings for prerogative remedies (now termed “mandatory orders”), ministers could be subject to mandamus, prohibition or certiorari in their official capacities as ministers.¹⁸⁸ His Lordship noted that proceedings for prerogative remedies are titled “*R v Minister Ex parte the applicant*” so as to distinguish the minister from the Crown (“R”) and avoid the “incongruity” of the Crown suing the Crown. His Lordship remarked:¹⁸⁹

This does not mean that the minister was treated as acting other than in his official capacity and the order was made against him in his official name. In accordance with this practice there have been numerous cases where prerogative orders, including orders of prohibition and mandamus, have been made against ministers.

Lord Woolf then determined that there was no impediment to finding contempt, “not against the Crown directly, but against a government department or a minister of the Crown in his official capacity.”¹⁹⁰ A finding of contempt against the minister officially would “be indicating that it is the department for which the minister is responsible which has been guilty of contempt”.¹⁹¹ This was appropriate as the contempt was “not of Mr Baker alone and he was acting on advice.”¹⁹² It would be unfair to find against the Home Secretary personally.

8.3.3.4. Implications of *M*

For many academics, *M* is the turning point¹⁹³ for the better in the common law surrounding the Crown, “a great breakthrough for the rule of law”.¹⁹⁴ A pleased Wade wrote after the House of Lords’ judgment that “the rule of law really works and the black day has been averted.”¹⁹⁵ Joseph

¹⁸⁷ At 410 – 415.

¹⁸⁸ At 415-416.

¹⁸⁹ At 416.

¹⁹⁰ At 424.

¹⁹¹ At 426.

¹⁹² At 427.

¹⁹³ For example, see Tom Cornford “Legal remedies against the Crown and its officers before and after *M*” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 233.

¹⁹⁴ Adam Tomkins in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 171 at 189.

¹⁹⁵ Wade, above n. 93, at 28-29.

describes the case as “the solution to the riddle”,¹⁹⁶ and as having “reconciled the Crown’s distinct capacities as Sovereign and as executive, and removed a major anomaly from the law.”¹⁹⁷

Despite the largely positive reception of *M*, the decision fails to resolve some fundamental issues about the Crown. First, it does not conclusively determine that the immunity attaches to the Sovereign and not to the Crown qua executive. Secondly, *M* does not dispel the uncertainty surrounding whether the Crown is a corporation aggregate or a corporation sole. As a result, it has not had any lasting impact on subsequent case law or rendered judicial reasoning any more coherent when it concerns the Crown. These criticisms are examined further below.

8.3.3.4 (a) Whose immunity?

Lord Woolf and Lord Templeman approached the issue of Crown immunity from mandatory orders in widely different ways. Lord Templeman had no doubt that the Crown has no immunity in contexts where “Crown” denotes the executive: “The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown.”¹⁹⁸

By contrast, Lord Woolf was careful to preserve the Crown’s immunity without any proviso that he meant “Crown” to refer to the Sovereign alone. His Lordship held that there was not “any impediment to a court making [a finding of contempt]...against a government department or a minister of the Crown in his official capacity” as long as the order was “not against the Crown directly.”¹⁹⁹

¹⁹⁶ Joseph, above n. 4, at 1153.

¹⁹⁷ Ibid. at 628.

¹⁹⁸ House of Lords in *M*, above n. 5, at 395.

¹⁹⁹ At 424.

Lord Woolf's approach appears to preserve the immunity for cases where "the Crown" as executive is acting directly instead of a minister acting as an individual officer. It is unclear what this means for practical purposes. One interpretation is that Lord Woolf was endorsing Wade's *persona designata* analysis and considered that the immunity from mandatory order would be triggered where a statute empowers the Crown directly instead of a named minister, such as s 2(2) of the European Communities Act 1972. If so, his Lordship's approach is vulnerable to the same criticisms as Wade's analysis²⁰⁰ and falls well short of Lord Templeman's full denial of any immunity for the executive. However, it is not clear from Lord Woolf's judgment that this is what he intended. His Lordship did not explicitly endorse Wade's *persona designata* analysis and did not provide examples of situations where the immunity would protect the Crown.

An alternative interpretation is that Lord Woolf intended to reduce the scope of Crown immunity to a theoretical possibility with no practical application. The Crown qua executive is an artificial person and it must act through individual officers. Allowing mandatory orders against ministers in their official capacity removes Crown immunity from the executive all but in name. A 2001 report of the New Zealand Law Commission considered that this was the case.²⁰¹ The report sagaciously asks, "If [Crown servants] are liable in their official capacity to mandatory orders, what is left of the common law rule that such orders cannot be made against the Crown?"²⁰² The report further noted that "[t]he Crown cannot perform any act or omission save by conduct of its officials".²⁰³ The Crown's immunity from mandatory orders is effectively gone if a finding of contempt can be made against a minister in his official capacity, "the very embodiment of the Crown's executive authority".²⁰⁴ If this is indeed what Lord Woolf intended, the effect of his proposition is more closely aligned with Lord Templeman's denial of executive immunity.

²⁰⁰ See discussion in Section 8.3.2.3.

²⁰¹ Law Commission, above n. 18.

²⁰² At [10].

²⁰³ Ibid.

²⁰⁴ Ibid.

However, one questions why Lord Woolf retained the theoretical possibility of Crown immunity at all. Sir Stephen Sedley (who acted as counsel for M) believes that the Lord Woolf should have been more forthright and abolished executive immunity from injunctions altogether.²⁰⁵ He suggests that Lord Templeman's comment that the Crown as executive enjoys no immunity "hit [the nail] right on the head."²⁰⁶ Lord Woolf's approach retains the scope for ambiguity as to when the executive may claim immunity on the ground that the mandatory order affects the Crown directly.

Case law and commentary since *M*'s case reflect this ambiguity. Some courts have followed Lord Templeman's approach and denied that the executive can claim any immunity from mandatory orders. A New Zealand Human Rights Review Tribunal decision described Crown immunity from mandatory orders "an anachronism" and concluded that mandatory orders can be made under the Crown under s 95 of the Human Rights Act 1993.²⁰⁷ At a more senior level, Clifford J in *Paul v Attorney-General* described *M* as having "distinguished between the Crown as Monarch and the Crown as Executive."²⁰⁸ His Honour considered that the Crown as Executive "included Ministers in their official or executive capacity, who (unlike the Crown as Monarch) enjoy no immunity from the mandatory orders."²⁰⁹ His Honour further stated that this position appeared to be "equally applicable in New Zealand".²¹⁰

On the other hand, there are many indications that *M* has not removed the immunity from the Crown as executive. For instance, Hogg, Monahan and Wright describe *M* as "confirm[ing] that... duties [on ministers] can be enforced by injunction (or mandamus), provided the proceedings are brought against the minister and not the Crown."²¹¹ In New Zealand, the Law Commission had

²⁰⁵ Sedley, above n. 175, at 260.

²⁰⁶ At 256.

²⁰⁷ *Idea Services Limited v A-G* [2013] NZHRRT 24 at [46.6] - [47].

²⁰⁸ *Paul*, above n. 88, at [25].

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Hogg, Monahan and Wright, above n. 6, at 49.

recommended that Parliament remove the Crown's immunity from mandatory orders in judicial review²¹² and the immunity from injunction and specific orders under s 17(2) of the Crown Proceedings Act 1950.²¹³ No legislative reform has been forthcoming and courts have continued to apply the immunity from mandatory orders to the Crown qua executive. In *Burrows v Police*,²¹⁴ Collins J held that the Police and Ministry of Justice were immune from restraining orders because restraining orders are a form of injunction and therefore are precluded by s 17 of the Crown Proceedings Act 1950.²¹⁵ In his Honour's opinion, "[t]he Ministry and the Police form part of the Crown."²¹⁶ His Honour did not turn his mind to Lord Templeman's argument in *M v Home Office* that "Crown" simply denotes the Sovereign and therefore the Crown's immunity does not extend to executive entities such as the Ministry of Justice or the Police.²¹⁷

It is also unclear if courts have appreciated the unanimous view of the Court in *M* that an order may lie against a government officer in his or her official capacity. In *Simpson v Attorney-General in respect of Chief Executive for the Department of Corrections*, Palmer and Travis JJ appeared to doubt that suing an officer in his or her "personal capacity" was a means of circumventing the immunity from mandatory orders under s 17(2) of the Crown Proceedings Act 1950.²¹⁸ Their Honours said:²¹⁹

We are not called upon to rule in this case whether or not this application could have been brought against the chief executive of the Department of Corrections personally and thus have avoided the difficulties raised by the defendant regarding interim declarations but note in this regard that s 17(2) of the Crown Proceedings Act prevents the Court in any civil proceedings granting any injunction or any order against an officer of the Crown which would have the

²¹² Law Commission, above n. 18.

²¹³ Law Commission, above n. 32.

²¹⁴ *Burrows*, above n. 174.

²¹⁵ At [40] – [43].

²¹⁶ At [32].

²¹⁷ House of Lords in *M*, above n. 5, at 395.

²¹⁸ *Simpson v Attorney-General in respect of Chief Executive for the Department of Correction* [1996] 2 ERNZ 253.

²¹⁹ At 264.

effect of giving such relief against the Crown which could not have been obtained in proceedings against the Crown.

Their Honours' reasoning disregards that even the narrowest interpretation of Lord Woolf's judgment would have resulted in a finding that the Chief Executive of Corrections can be enjoined in his official capacity as he is acting as an individual officer, rather than the Crown. Thus, the legal position on the Crown's immunity from mandatory orders remains as conflicted after *M* as it was before.

8.3.3.4 (b) Enduring confusion as to corporation analogy

A further implication of Lord Templeman and Lord Woolf's different approaches is that the confusion as to whether the Crown is a corporation sole or a corporation aggregate remains. Lord Templeman treated the Crown as having two distinct meanings: the Sovereign and the executive.²²⁰ The latter meaning implicitly endorses the corporation aggregate analogy because it treats the apparatus of executive government as part of the Crown.

By contrast, Lord Woolf drew a distinction between "the Crown" (which cannot commit contempt of court) and "a government department or a minister of the Crown in his official capacity" (who can commit contempt).²²¹ This assumes a corporation sole analogy of the Crown in which government departments and ministers are not part of the "Crown" itself.

However, Lord Woolf did not expressly acknowledge that he was drawing on the corporation sole analogy; his Lordship considered that the Crown could be either a corporation aggregate or a corporation sole or both.²²² This has understandably drawn criticism from proponents of both, the corporation sole and the corporation aggregate analogy. Wade would have preferred Lord Woolf to have defined the Crown unambiguously as a corporation sole and queried "how can it

²²⁰ House of Lords in *M*, above n. 5, at 395.

²²¹ At 424.

²²² *Ibid.*

be both?”²²³ By contrast, Loughlin criticised *M* for failing to embrace the corporation aggregate analogy to nurture a more fitting state theory. He accused *M* of being “an attempt to refashion public law while retaining intact an unreconstructed core.”²²⁴

The depth of the confusion about the Crown’s legal personality is apparent in *Bain v Minister of Justice*,²²⁵ where Keane J flitted between the corporation sole and corporation aggregate analogies without recognising the underlying inconsistency in this form of reasoning. The applicant, Mr Bain, sought judicial review of a decision by the Minister of Justice to disregard a report that recommended that Bain be compensated for having been imprisoned for thirteen years for a crime of which he was subsequently acquitted. During discovery, the Minister claimed privilege over certain departmental advice she had received about the report. Counsel for Bain argued that the Minister had waived privilege by disclosing that advice to the Police.

Keane J considered that the “real question...is to whom does the privilege belong, the Minister or the Crown as a whole?”²²⁶ This was, in his Honour’s view, an issue concerning the “personality of the Crown; as to whether the Minister acted as and for the Crown or personally”.²²⁷ One detects in this the same question – whether the Crown is a corporation sole (in which case one may say that the Minister is distinct from the Crown and acted personally) or a corporation aggregate (in which case the Minister acted as the Crown).

Initially, Keane J endorsed the corporation aggregate analogy: his Honour described the Crown as a “single and indivisible entity...compris[ing] many autonomous office holders, entities and

²²³ Wade, above n. 93, at 24.

²²⁴ Martin Loughlin “The State, the Crown and the law” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 33 at 73.

²²⁵ *Bain*, above n. 61.

²²⁶ At [86].

²²⁷ At [110].

instruments.”²²⁸ Consistently with this view, his Honour considered that “the privilege is that of the Crown as a whole.”²²⁹

The logical implication of holding the Crown to be a corporation aggregate is that the Minister, being an office-holder of the Crown, was acting throughout as the Crown. This would mean that a disclosure of privileged material by the Minister would amount to a disclosure by the Crown, resulting in a waiver of the privilege. At this point, Keane J’s reasoning faltered. His Honour ruled that the Crown’s privilege over the documents remained notwithstanding the Minister’s disclosure; the Minister’s disclosure did not count as a waiver of privilege as the privilege belonged to the Crown as a whole. His Honour stated:²³⁰

[B]efore privilege can be waived by a department or minister, the Attorney-General’s consent must be obtained through the Crown Law Office. There is no evidence that this ever happened.

This reasoning reverts to the corporation sole analogy. It assumes that the Minister is distinct from the Crown and that the Crown’s privilege can only be waived by the Attorney-General.

Keane J’s reasoning is therefore self-contradictory. His Honour holds the Crown to be a corporation aggregate for the purposes of privilege but a corporation sole for the purposes of waiver. The upshot is that the executive enjoys an insurmountable advantage over the individual litigant.

Bain v Minister of Justice is perhaps one of the more egregious examples of judicial confusion. However, it is by no means exceptional. It follows in the wake of equally tortuous reasoning about

²²⁸ At [115].

²²⁹ At [124].

²³⁰ At [137].

the legal personality of the Crown in cases such as *Bird*,²³¹ *Mohammed*²³² and *Fiordland*.²³³ It is a reflection of the issues with the concept of the Crown itself that highly experienced judicial minds can indulge in such self-contradictory reasoning and be unaware of the contradiction.

8.4. Conclusion

There is a simple solution to the above issues, albeit it is one that the Law Commission has already recommended twice without success:²³⁴ Parliament could abolish the immunity from mandatory orders so that a mandatory order can lie directly against the Crown or any officer. This would make it unnecessary to distinguish the minister from the Crown to justify an order against a minister. This in turn would sweep aside all the confusions regarding the ministerial capacities in which a minister can be subject to a mandatory order. A court can simply order the Crown to comply with its legal obligation.

Abolishing the immunity would also achieve greater consistency with the constitutional ideal of equality before the law. The fact that mandatory orders are discretionary makes it unlikely that there will be any adverse impact on the executive's ability to override individual rights in exceptional circumstances such as emergencies. Institutional comity between the judiciary and executive branch is an adequate safeguard against any such risk.

Chapter 11 proposes an alternative State theory where mandatory orders will be available directly against the State. It contends that the proposal will make lessen the imbalance between the executive government and individual litigants in legal proceedings. It will also simplify the legal reasoning behind whether or not a mandatory order should be granted. Courts will no longer need to ask whether they have jurisdiction to make such orders; the decision will turn on the balance between the interests of justice and other policy considerations.

²³¹ *Bird*, above n. 85.

²³² *Mohammed*, above n. 115.

²³³ *MacIntyre*, above n. 85

²³⁴ See Law Commission, above n. 18, and Law Commission, above n. 32.

Chapter 9: Presumption of exemption from statutes

9.1. Overview

It is a presumption of statutory interpretation in New Zealand that a statute will not bind the Crown other than by express provision or by necessary implication.¹ This presumption also exists in the United Kingdom,² and, with slight variations, in Canada³ and Australia,⁴ with the exception of the jurisdictions of South Australia,⁵ the Australian Capital Territory,⁶ British Columbia⁷ and Prince Edward Island.⁸ In New Zealand, s 27 of the Interpretation Act 1999 provides:⁹

No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment.

This chapter argues that the immunity from statute has neither historic nor modern rationale. The current presumption derives from a broadening of a much more limited immunity that the king historically enjoyed from certain kinds of statutes. The presumption offends the rule of law without serving any discernible functional need of the executive government. The question when

¹ Interpretation Act 1999, s 27; Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 666, citing *Gorton Local Board v Prison Commissioners* 1904] 2 KB 165 at 168.

² *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81 at [35], *per* Lady Hale.

³ Interpretation Act RSC 1985 c I-21, s 17; Interpretation Act RSA 2000, c I-8, s 14; Interpretation Act CCSM 2000 c 180, s 49; Interpretation Act RSNB 1973 c I-13, s 32; Interpretation Act RSNL 1990 c I-19, s 12; Interpretation Act RSNS 1989 c 235, s 14; Interpretation Act SNWT 2017 c 19, s 8; Legislation At 2006 SO 2006 c 21, s 71; Interpretation Act RS 1964 c I-16, s 42; Interpretation Act SS 1995 c I-11.2, s 14; Interpretation Act RSY 2002 c 125, s 13; for a general discussion of the presumption at common law in Canada, see Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carswell, Ontario, 2011) Ch 15.

⁴ *Bropho v Western Australia* (1990) 171 CLR 1; Acts Interpretation Act 1954 (Qld), s 13; Acts Interpretation Act 1931 (Tas), s 6(6); see Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013) at [4.19].

⁵ Acts Interpretation Act 1915 (SA), s 20.

⁶ Legislation Act 2001 (ACT), s 121.

⁷ Interpretation Act RSBC 1996 c 238, s 14.

⁸ Interpretation Act RSPEI 1998 c I-8, s 14.

⁹ The predecessor to s 27 of the Interpretation Act 1999 was s 5(k) of the Acts Interpretation Act 1924.

the Crown is bound by “necessary implication” is fraught with uncertainty. It is submitted that the case for maintaining the status quo is weak and the immunity should be abolished.

9.2. No historical justification

The presumption that express statutory provision is necessary to bind the Crown is at odds with a number of cases from the 16th and 17th centuries where the courts found that statutes bound the king despite a lack of express reference.¹⁰ In *Willion v Berkley*,¹¹ the King’s Bench held that a statute that restricted the ability to alienate land bound the king without any express word or necessary implication. Brown J said that it would be a “difficult argument to prove that a statute, which restrains men generally from doing wrong, leaves the King at liberty to do wrong.”¹² Sir Edward Coke likewise affirmed in *Magdalen College*¹³ that “[t]he King shall not be exempted by construction of law out of the general words of an act to suppress wrong, because he is the foundation of justice and common right...”¹⁴

It is apparent that the Sovereign did enjoy some immunity from statute but there were several limitations and exceptions to the scope of that immunity. In *Magdalen College*, Coke described the immunity as confined to statutes that derogated from “any prerogative, estate, right, title or interest of the Crown.”¹⁵ In *Attorney-General v Allgood*,¹⁶ the Court observed that “the Crown is not bound where it would be ousted of a precedent prerogative without express words.”¹⁷ Another case, also known as *Attorney-General v Allgood*, held that “it is a general rule, that the King shall not be bound by statutes which do not name him” but noted that “this rule has several

¹⁰ For detailed discussions of the development of the immunity, see Anthony Gray “Immunity of the Crown from statute and suit” [2010] Can. Law. Rw. 1; Harry Street “The effect of statutes upon the rights and liabilities of the Crown” (1948) 7(2) UTLJ 357.

¹¹ *Willion v Berkley* (1559) *Commentaries or Reports of Edmund Plowden – Part 1* (S Brooke, London, 1816) 222a.

¹² At 248.

¹³ *Magdalen College* (1615) 11 Co Rep 66, 72a, 77 ER 1234.

¹⁴ At 1243.

¹⁵ At 1247.

¹⁶ *Attorney-General v Allgood* (1734) 4 Parker 1; 145 ER 696.

¹⁷ At 697.

exceptions”.¹⁸ The exceptions included Acts to suppress wrong or fraud, or to prevent the decay of religion, and several individual Acts that the courts had previously found to apply to the king.¹⁹

It is difficult to find a unifying principle behind the limitations and exceptions to the historic immunity. Street has suggested that “the aim of the statute was the determining factor”.²⁰ Street’s survey of case law between the 15th and 18th centuries reveals a judicial focus on whether the statute “intended to take from the Crown [a] power” as a means to determine whether the statute bound the Crown.²¹

The modern presumption that express words are needed to bind the Crown only emerged between the late-18th and early 20th centuries.²² Street suggests that the presumption developed due to a shift in judicial focus from the intent to the actual words of the statute – that is, the development of a literal approach to statutory interpretation.²³ Lord Kenyon first formulated the current presumption with the remark in *R v Cook* that “[g]enerally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect.”²⁴ By 1842, it was already “well-established rule” that “the construction of acts of Parliament that the king is not included unless there be words to that effect.”²⁵ The Court in *Attorney-General v Edmunds* made a minor concession to the need for the Crown to be bound by the “necessary implication” of a statute.²⁶ Thus, by 1870, the presumption had taken its present form that “the Crown was not affected except by express enactment or by necessary implication.”²⁷

¹⁸ *Attorney-General v Allgood* (1743) Easter Term, 16 Geo II 1 at 4.

¹⁹ *Ibid.*

²⁰ Street, above n. 10, at 365.

²¹ *Ibid.*

²² At 366.

²³ At 366 – 367.

²⁴ *R v Cook* (1790) 3 TR 519 at 521.

²⁵ *Attorney-General v Donaldson* (1842) 10 M & W 117 at 124, *per* Alderson B.

²⁶ *Attorney-General v Edmunds* (1870) 22 LTR 667 at 667.

²⁷ *Gorton*, above n. 1, at 167, *per* Day J.

The consensus among commentators is that the presumption evolved without good historic precedent and without any enquiry into the policy reason of or pragmatic need for the executive to be exempt from statute. As already discussed, Street considers the immunity to have developed as a by-product of the literal approach to statutory interpretation.²⁸ In Gray's view, the 19th century cases that expanded the scope of the immunity were "glosses" and "judicial add-ons" that "cannot find support in the original statements in the 17th century cases."²⁹ Hogg believes that the presumption developed "without either proper understanding of the old cases or discussion of the reasons behind them."³⁰

Nor did the government or Parliament question whether the immunity ought to continue. The Mellor Memorandum expressly declined to "suggest consideration of the rule that the Crown is not bound by Acts of Parliament unless by express provision."³¹ Parliamentary debates before the Crown Proceeding Act 1947 (UK) also do not suggest that the legislators focussed on the immunity. Writing in 1948, Glanville Williams attributed the immunity's survival to "due to little but *vis inertiae*".³² The fact that the immunity has continued has therefore nothing to do with the executive's functional requirements: it is the result of historical oversights.

9.3. Modern issues

There are several issues with the presumption that the Crown is exempt from statute in the absence of express contrary intention or necessary implication. First, the presumption

²⁸ Street, above n. 10, at 365 – 368 and 384.

²⁹ Anthony Gray "Options for the doctrine of Crown immunity in 21st century Australia" (2009) 16 AJ Admin L 200 at 201.

³⁰ Ontario Law Reform Commission *Report on the liability of the Crown* (1989) at 106; Law Reform Commission of Saskatchewan *Presumption of Crown immunity – consultation paper* (October 2012) at 11; Hogg, Monahan and Wright, above n. 3, at 456.

³¹ John Mellor *Memorandum* (LCO2/1094(1), 1921) at 12, quoted by Joseph Jacob *The Republican Crown* (Dartmouth, Aldershot, 1996) at 69.

³² Glanville Williams *Crown proceedings: an account of civil proceedings by and against the Crown as affected by the Crown Proceedings Act, 1947* (Stevens, London, 1948) at 53.

undermines the principle of that the executive government is subject to the law: it presupposes that there is a public interest in holding the Crown to be exempt from statute despite the reality that public interest and government interest may often diverge. Secondly, the presumption creates considerable uncertainty: the question whether the Crown is bound by “necessary implication” poses many interpretive difficulties and the analysis of whether an entity is the Crown is highly incoherent.³³

9.3.1. Unequal treatment before the law

The principle that the executive government is subject to the law originates from the Magna Carta³⁴ and has fundamental constitutional significance in New Zealand and other common law jurisdictions.³⁵ The presumption of Crown immunity from statute is a conspicuous exception to this principle and one for which no policy reason appears to exist. The Supreme Court of Canada has described the presumption as “seem[ing] to conflict with basic notions of equality before the law.”³⁶ The Law Commission of Ontario echoes a similar sentiment in observing that the immunity from statute “conflicts with the basic constitutional assumption that the Crown should be under the law”.³⁷

One explanation for the immunity is that the Crown in Parliament makes these statutes with a view to binding the general public rather than the Crown itself. In *Attorney-General v Donaldson*, Alderson B claimed that the presumption reflects the fact that “*prima facie* a law made by the crown with the assent of Lords and Commons is made for the subjects and not for the crown.”³⁸ The explanation seems counterintuitive. As Hogg, Monahan and Wright note, “[t]here is no good

³³ See Chapter 6.

³⁴ F Pollock and F Maitland *History of English Law before the time of Edward I – Volume 1* (2nd ed, Cambridge University Press, Cambridge, 1898) at 173.

³⁵ David Baragwanath, Justice of the Court of Appeal of New Zealand “Magna Carta and the New Zealand Constitution” (Address to the English Speaking Union, 29 June 2008) at 2; New Zealand Parliament “800th anniversary of the Magna Carta” (12 June 2015) *New Zealand Parliament* <www.parliament.nz>.

³⁶ *R v Eldorado Nuclear Ltd* [1983] 2 SCR 551 at 668, *per* Dickson J.

³⁷ Ontario Law Commission, above n. 30, at 109.

³⁸ *Donaldson*, above n. 25, at 124.

reason why the Crown should be generally free to ignore the rules that have been enacted for the regulation of society.”³⁹ They draw support for this view from the comment in *Willion v Berkley* that “when the King in Parliament ordains a remedy for a mischief, ‘it is not to be presumed that he intended to be at liberty to do the mischief.’”⁴⁰

Other attempts to justify the presumption of immunity rely on the argument that government needs to be treated differently from individuals in some respects. The New Zealand Law Commission stated in its defence of the immunity in 2000 that the “government must be allowed to govern, and that the nature of government requires the executive to have certain powers and immunities unavailable to the private citizen.”⁴¹ This is an overly broad proposition that does not explain why the presumption of immunity from statute is necessary to preserve the executive’s ability to govern effectively.

Moreover, the argument can only hold true (if at all) for actions that are “governmental” in nature, that is, actions in which private bodies would never engage. There is a vast area of government actions that is little different in nature from private actions. As Joseph notes, “in reality the modern Crown is expansive and multifarious... sometimes exercising commercial or developmental functions in competition with private interests.”⁴² Examples include the government acting as landlord or occupier of premises or engaging in commercial activities. It is difficult to justify why there should be a default presumption that the Crown is immune from the statutory requirements relating to these activities when private entities are bound by the requirements.

The supposition underpinning the presumption appears to be that avoiding prejudice to the Crown from the application of a statute is a “good” in itself. In Joseph’s view, the supposition

³⁹ Hogg, Monahan and Wright, above n. 3, at 456.

⁴⁰ Ibid., citing *Willion*, above n. 11, at 244.

⁴¹ Law Commission *To bind their kings in chains* (NZLC SP6, 2000) at [10].

⁴² Joseph, above n. 1, at 669.

“presages a monolithic Crown, moving with a singleness of purpose that is invariably for the public good”.⁴³ The supposition is overly simplistic: the executive’s interests are not synonymous with the public good and avoiding prejudice to the Crown from a statute is not necessarily beneficial to the public interest. A couple of examples illustrate this point. In *Province of Bombay v Municipal Corporation of Bombay*, the Privy Council found that the Municipal Corporation’s statutory powers to lay pipes in any area of the city did not extend to “private land belonging to the Government of Bombay” containing the residences of government employees.⁴⁴ The advantage to the Crown in this case had nothing to do with the public benefit as the government land was being used for the “private” purpose of housing government employees. More recently, the Supreme Court of the United Kingdom found that a smoking ban did not bind the government departments.⁴⁵ This was because while “[i]t might well be thought desirable, especially by and for civil servants and others working in or visiting government departments [for the smoking ban to bind the Crown] the legislation is quite workable without doing so”.⁴⁶ It would appear in this instance that the advantage to the Crown from being exempt from the statute was directly in conflict with the public good.

It is also not clear that exempting the Crown from statutory requirements benefits the public where a the Crown is acting towards a “public good”. In *Wellington City Corporation v Victoria University of Wellington*, the then-Supreme Court found that no building permit was necessary for the University to construct a new building on Crown land as part of a government-funded project, and that the local authority had no power to impose a height restriction on the building.⁴⁷ The Court reasoned that this was appropriate because “a project in which the Crown is so deeply involved should be within the scope of Crown immunity and exempt from local authority control.”⁴⁸ The Court acknowledged that exempting the Crown from the statutory controls could

⁴³ Ibid.

⁴⁴ *Province of Bombay v Municipal Corporation of Bombay* (1947) 49 BOMLR 257 (PC, India); [1947] AC 58 at [4].

⁴⁵ *Black*, above n. 2.

⁴⁶ At [49].

⁴⁷ *Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301

⁴⁸ At 309.

undermine the statutory purpose of regulating adverse impacts on the environment. It concluded:⁴⁹

Whether, in cases of this kind, the law enacted by Parliament contains sufficient safeguards of the environment or provides adequately for the responsibilities of the Government in that respect, as distinct from the rights of the Government in respect of public property and funds, are questions outside the province of the Court.

The result is difficult to accept. The mere fact that the government is invested in a project should not make the completion of that project a greater “good” than the public good in adhering to statutes designed as safeguards. Yet that is what the presumption of Crown immunity from statute presupposes.

The supposition that benefitting the Crown is a “good” in itself is also manifest in the rule that the Crown is entitled to benefit from a statute even when the statute does not apply to the Crown.⁵⁰ Section 29 of the Crown Proceedings Act 1950 (emulating s 31 of the Crown Proceedings Act 1947 (UK) and codifying the common law position⁵¹) provides that:

This Act shall not prejudice the right of the Crown to take advantage of the provisions of an Act although not named therein; and it is hereby declared that in any civil proceedings against the Crown the provisions of any Act which could, if the proceedings were between subjects, be relied upon by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be relied upon by the Crown.

Town Investments Ltd v Department of Environment illustrates this rule in operation.⁵² In that case, House of Lords found that the government as a tenant was entitled to benefit from the

⁴⁹ Ibid.

⁵⁰ See Joseph, above n. 1, at 672.

⁵¹ *Harcourt v Attorney-General* [1923] NZLR 686.

⁵² *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813.

rent-freeze provisions of counter-inflation statutes, although the statutes expressly stated that they did not bind the Crown. The judgment displays a curious dichotomy: on one hand, Lord Diplock insisted on using the modern terminology of “government” to refer to the Crown to eliminate “some of the more Athanasian-like features of the debate” surrounding whether the tenant was the Crown.⁵³ Yet his Lordship uncritically accepted the rule that the Crown was entitled to benefit from statutes despite not being bound by them: there was no comment on whether it was appropriate that the executive government as a tenant should benefit from rent-freeze provisions whereas as a landlord it was free to increase rent.⁵⁴ The House of Lords may have intended to introduce clearer reasoning surrounding the nature of the executive but that did not extend to questioning the rationale behind the law’s presumptions in the executive’s favour.

The issue with the presumption of immunity from statute and the rule allowing the Crown to take the benefit of a statute is that they entrench favourable treatment of the executive in the law even when it is engaging in conduct that is no different from the conduct of a private person or corporation. Joseph and Hogg, among others, have recommended that the rule should be abolished.⁵⁵ The preceding analysis gives strong reason to support that recommendation.

9.3.2. Interpretive uncertainty

A further issue with the presumption of Crown immunity from statute is that it creates considerable uncertainty in statutory interpretation. A two-stage enquiry is needed to ascertain whether or not the presumption applies. The court has to determine first, whether the statute applies to the Crown, and secondly, if the entity claiming the immunity is the Crown.⁵⁶ The ensuing discussion shows that these are highly complex questions.

⁵³ At 818.

⁵⁴ For a criticism of the decision, see Carol Harlow “The Crown: wrong once again?” (1977) 40(6) *Modern Law Review* 728.

⁵⁵ Joseph, above n. 1, at 673; Hogg, Monahan and Wright, above n. 3, at 459 – 460.

⁵⁶ See Seddon, above n. 4, at 209.

Whether a statute binds the Crown depends on the existence of an express provision or a necessary implication to that effect. Section 27 of the Interpretation Act 1999 only refers to binding the Crown by express provision but the courts accept that a necessary implication is also sufficient.⁵⁷

Express provisions pose few interpretive issues. In New Zealand, statutes enacted after 2000 usually have an express provision specifying whether or not the statute binds the Crown. For example, s 8(1) of the Local Government Act 2002 states that the Act does not bind the Crown except as provided elsewhere within the Act. Section 8(1) of the Contract and Commercial Law Act 2017 states that the Act does bind the Crown but s 8(2) exempts the Crown from certain subparts of the Act.

However, “a very large number” of New Zealand statutes enacted before 2000 contain no express provision.⁵⁸ One might take this as evidence of an intention not to bind the Crown. That is not the case. A Law Commission report from 1990 observes that:⁵⁹

Long practice shows that Parliament does not think it has to use express words [to bind the Crown]. The Crown Proceedings Act 1950 itself is a prime example. It is an Act “to amend the law relating to the civil liabilities and rights of the Crown”. It does not expressly state that it binds the Crown...Yet it clearly does affect the rights of the Crown.

Statutes that clearly intend to bind the Crown but do not expressly say so include the Crown Proceedings Act 1950, the Ombudsmen Act 1975, the Constitution Act 1986, the State Sector Act 1988 , the Electoral Act 1993, the New Zealand Bill of Rights Act 1990 and the Interpretation Act

⁵⁷ Joseph, above n. 1, at 671.

⁵⁸ Law Commission *A new Interpretation Act to avoid “proximity and tautology”* (E 31L, 1990) at [156].

⁵⁹ At [153].

1999.⁶⁰ This means that courts cannot rely on an Act's express provisions as conclusive of the Act's intent as to binding the Crown; courts have to ask whether a statute that is silent binds the Crown by necessary implication.

There are conflicting interpretations of "necessary implication". For many years, courts across the Commonwealth accepted the Privy Council's ruling in *Bombay* that a statute would only bind the Crown by "necessary implication" if the purpose of the statute would otherwise be "wholly frustrated".⁶¹ This was an "onerous"⁶² threshold but brought a level of certainty to the legal position. In the past three decades, the courts have branched out from *Bombay* and adopted increasingly lenient thresholds for "necessary implication". The ensuing paragraphs briefly outline the different thresholds in the United Kingdom, Canada, Australia and New Zealand. It is submitted that the jurisdictional differences and the courts' failure to make a clean break from *Bombay* in every jurisdiction but Australia make the applicable threshold uncertain.

The Supreme Court of the United Kingdom has conceded in *R (on the application of Black) v Secretary of State for Justice* that the purpose of a statute need not be "wholly frustrated" for a necessary implication to arise. It is enough for "one very important purpose of the Act" to be frustrated.⁶³ Notwithstanding the fact that this is a lower threshold than *Bombay*, the Supreme Court held in *Black* that a smoking ban did not apply to the government because the "the legislation is quite workable without doing so".⁶⁴ Whether the lower threshold will make a discernible impact on statutory interpretation in the United Kingdom remains to be seen.

⁶⁰ Joseph, above n. 1, at 670.

⁶¹ *Province of Bombay*, above n. 44; see Joseph, above n. 1, at 666; Hogg, Monahan and Wright, above n. 3, at 399; Gray, above n. 10, at 8.

⁶² Joseph, above n. 1, at 666 – 667.

⁶³ *Black*, above n. 2, at [36] *per* Baroness Hale.

⁶⁴ At [49].

In Canada, *Bombay* remains the leading authority following the Supreme Court's view that any reversal of the presumption must come from the legislature.⁶⁵ However, a number of Canadian decisions have held that a statute binds the Crown because it is the "logical implication" of the statute.⁶⁶ According to Hogg, the "logical implication" test does not place much weight on the presumption of exemption from statute.⁶⁷

Further, Canadian courts have carved out significant exceptions to the *Bombay* rule. An implied term in a contract can make a statute binding on the Crown without express words or necessary implication.⁶⁸ A statute can also bind the Crown if it is incorporated by reference within another statute that binds the Crown;⁶⁹ such incorporation does not have to be express, and the incorporated statute does not need to have express words or a necessary implication to the effect that it binds the Crown.⁷⁰

A third exception is that any statutory restriction that has a sufficient nexus with a statutory right will bind the Crown without express words or necessary implication if the Crown attempts to take advantage of the statutory right.⁷¹ Hogg, Monahan and Wright note that a liberal interpretation of "Crown advantage" can result in "a massive limitation of the presumption of Crown immunity"⁷² because arguably, any commercial transaction or acquisition of property amounts to "taking advantage of the entire network of laws that contribute to the security and

⁶⁵ *Alberta Government Telephones v Canada* (1989) 2 SCR 225; see Hogg, Monahan and Wright, above n. 3, at 402 – 403.

⁶⁶ *R v Ouellette* [1980] 1 SCR 568 at 575; *Attorney-General of Quebec v Expropriation Tribunal* [1986] 1 SCR 732 at 741; *Friends of Oldman River Society v Canada* [1992] 1 SCR 3 at 61; see commentary on these cases in Hogg, Monahan and Wright, above n. 3, at 412 – 415.

⁶⁷ Hogg, Monahan and Wright, above n. 3, at 415.

⁶⁸ *Bank of Montreal v Attorney-General of Quebec* [1979] 1 SCR 565.

⁶⁹ *Brophy v Nova Scotia* (1985) 68 NSR (2d) 158 (SCTD); *Investors Group Trust Co. Ltd v Eckhoff* [2008] 9 WWR 306 (Sask. CA).

⁷⁰ Hogg, Monahan and Wright, above n. 3, at 427 – 428.

⁷¹ At 421, citing *Toronto Transportation Commission v R* [1949] SCR 510; *Attorney-General of Canada v Dennis* (1986) 29 DLR (4th) 314 (Alta CA); *Royal Bank of Canada v Black and White Developments* (1988) 52 DLR (4th) 120 (Alta CA); *Sparling v Caisse de d'épôt et placement due Québec* [1988] 2 SCR 1015.

⁷² At 423.

transferability of property and the efficacy of commercial transactions.”⁷³ Courts have not yet taken this step⁷⁴ but the interpretation of “Crown advantage” is sometimes generous.⁷⁵ For example, the Crown was bound by the statutory requirement of filing an insider report when it had taken the “advantage” of the statute by purchasing common shares in a corporation incorporated under a federal incorporation statute.⁷⁶

The result of having so many exceptions is that it is uncertain what the scope of the *Bombay* doctrine actually is in Canada. This makes “the current state of the law...exceedingly complex.”⁷⁷

The High Court of Australia in *Bropho v State of Western Australia* has renounced the *Bombay* test entirely,⁷⁸ calling it “stringent and rigid” and “unacceptable”.⁷⁹ It has adopted a purposive approach to interpreting whether a statute binds the Crown, albeit the presumption remains that the Crown is not to be bound in the absence of contrary intent in the statute.⁸⁰ Many commentators laud the Australian approach as the second-best alternative to a reversal of the presumption.⁸¹ However, the contextual analysis lends itself to vigorous dispute in litigation, holding up public resources and straining litigants’ personal resources.⁸²

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ At 422 – 424, citing *Sparling*, above n. 71, and *Quebec v Ontario Securities Commission* (1992) 10 OR (3d) 577 (CA).

⁷⁶ *Sparling*, above n. 71.

⁷⁷ Hogg, Monahan and Wright, above n. 3, at 457.

⁷⁸ *Bropho v State of Western Australia* (1990) 171 CLR (HCA).

⁷⁹ At [19] per Mason CJ.

⁸⁰ At [17] and [18].

⁸¹ For example, see Joseph, above n. 1, at 668 – 669; Gray, above n. 10, at 34 – 35; Simon Venus “Crown immunity of statutory corporations” [2002] AMPLA Yearbook 689 at 702.

⁸² Australian Law Reform Commission *The judicial power of the Commonwealth: a review of the Judiciary Act 1903 and related legislation* (ALRC 92, 2001) at [22.40] – [22.43], [26.20] – [26.22]; see also, Gray, above n. 10, at 23 – 25.

The legal position in New Zealand is ambiguous. New Zealand courts generally ask if the context of the statute makes it “unthinkable” that it does not apply to the Crown.⁸³ However, *Bombay* has never been overruled and appears to remain good law.⁸⁴ In *Attorney-General v Body Corporate No 68792*, Mallon J referred to *Bombay* as one of the authorities for the proposition that:⁸⁵

A necessary implication can arise where the purpose of an enactment is frustrated if the Crown is not bound or if the subject matter renders it unthinkable that the Crown is not bound.

It is curious that Mallon J dropped the word “wholly” from the formulation of the *Bombay* test; this would suggest that the requirement in New Zealand is only for the purpose of the statute to be “frustrated”, not “wholly frustrated”.⁸⁶ Whether this is a deliberate laxation of the test or imprecise paraphrasing is unclear. Adding to the ambiguity, Mallon J appeared to adopt a contextual analysis of whether or not the statute was bound. Her Honour stated that “[w]hether it would be unthinkable that the Crown is not bound by the [relevant legislation] might depend on the context in which [the legislation] might have application.”⁸⁷ Contextual interpretation of this kind is more aligned with the flexible Australian approach in *Bropho* than the traditional *Bombay* approach. It is therefore a moot question whether New Zealand will adhere to *Bombay*, relax the *Bombay* threshold somewhat or adopt the Australian approach.

A second source of uncertainty is the whether a body claiming the immunity in a proceeding is the Crown. As discussed in Chapter 6, the boundaries of the Crown are indeterminate. The “control” test generally determines whether or not an entity is the Crown and can claim the

⁸³ *Rankin v A-G* [2001] ERNZ 412 at [26]; *Attorney-General v Body Corporate 68792* HC Wellington, CIV 2006-485-1341, 29 March 2007 at [78].

⁸⁴ Joseph, above n. 1, at 669; *Body Corporate 68792*, above n. 83, at [78].

⁸⁵ *Body Corporate 68792*, above n. 83, at [78].

⁸⁶ At [78].

⁸⁷ At [80].

Crown's immunities in a proceeding.⁸⁸ The courts also occasionally use a function analysis to decide if a body is the Crown.⁸⁹ Servants, agents, officers and other "emanations" can all claim to represent the Crown.⁹⁰ These terms and tests are difficult to reconcile and contribute to the incoherence of the definition of "Crown".

The test for whether an entity can claim the immunity from statute is whether adds to the incoherence.⁹¹ Courts typically ask whether applying the statute to the entity would result in "prejudice to the Crown" or whether the rights of the Crown would be affected.⁹² The language of the test derives from s 5(k) of the Acts Interpretation Act 1924, which codified the presumption before s 27 of the Interpretation Act 1999 and provided that "No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby..." The immunity applies to an entity if there would be a prejudice to the rights of the Crown from applying the statute to that entity. This means that the boundaries of the Crown for the purposes of the immunity from statute are wider and more fluid than under the control or public functions tests. Further, entities who are not servants, agents, officers or other emanations of the Crown can nonetheless claim the immunity from statute.

A brief sampling of the persons and entities in New Zealand who have successfully claimed the Crown's immunity from statute, and those who have failed to do so, illustrates the uncertain application of the "prejudice to the Crown" test. Education boards could not claim the immunity⁹³ but a university could.⁹⁴ A board established by statute to administer a sports facility owned by

⁸⁸ See Section 6.3.1.

⁸⁹ See Section 6.3.3.

⁹⁰ See Section 6.3.4.

⁹¹ See also Section 6.3.2.

⁹² *Lower Hutt City v Attorney-General* [1965] NZLR 65 (CA) at 81; *Victory Park Board v Christchurch City* [1965] NZLR 741 (SC) at 747; *Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301 (SC) at 309; Joseph, above n. 1, at 633.

⁹³ *McCallum v Official Assignee of Sagar and Lusty* [1928] NZLR 292.

⁹⁴ *Wellington City Corporation*, above n. 92.

the Crown did not have immunity.⁹⁵ By contrast, plumbers carrying out work on government land at the direction of a government department enjoyed the immunity,⁹⁶ as did a person who allowed government workers to use his bulldozer to carry out roadworks.⁹⁷ It appears therefore that the scope of the immunity cuts across notions of “public” and “private” sectors: potentially anyone can enjoy the Crown’s immunity from statute if their actions can be linked with the rights of the Crown.⁹⁸

9.3.3. Reversing the presumption: recommendations for reform

Hogg, Monahan and Wright write that “the law would be vastly simplified if there were a presumption that the Crown was bound by statute.”⁹⁹ This would appear to be a sensible proposal in view of the issues with the presumption of immunity set out in the preceding section. However, the New Zealand Law Commission published a report in 2000 recommending that the presumption of immunity should remain.¹⁰⁰ The report dismissed a previous recommendation by the Law Commission to reverse the presumption. The ensuing discussion challenges the 2000 report and argues that it provides no convincing reasons for retaining the immunity. It also proposes options for reform.

The background to the 2000 report is as follows: in 1990, the Law Commission had proposed a new Interpretation Act to replace the then-operative Acts Interpretation Act 1924.¹⁰¹ One of the recommendations was that the new Act should reverse the presumption of Crown immunity. It had proposed the following provision:¹⁰²

⁹⁵ *Victory Park Board*, above n. 92.

⁹⁶ *Lower Hutt City Council*, above n. 92.

⁹⁷ *Winter v Harvey* (1947) 42 MCR 25.

⁹⁸ See Section 6.3.2.

⁹⁹ Hogg, Monahan and Wright, above n. 3, at 457.

¹⁰⁰ Law Commission, above n. 41.

¹⁰¹ Law Commission, above n. 58.

¹⁰² At [178].

Every enactment binds the Crown unless it otherwise provides or the context otherwise requires.

This provision was to apply to existing and future legislation.¹⁰³

In 1997, a new Interpretation Bill finally reached the Select Committee. By this time, the composition of the Law Commission had “completely changed.”¹⁰⁴ The Law Commission now opposed the reversal of the presumption in the following terms:¹⁰⁵

While [the Law Commission] reaffirms that, in principle, the Crown should be subject to the general law of the land, it recognises that there are certain public functions to be performed that require the Crown to have certain additional powers and immunities not enjoyed by citizens. The Law Commission is satisfied that a principled and practical approach requires careful consideration of specific cases rather than a simple reversal of the presumption. To reverse the presumption without being able to predict the effects would infringe the principle of the rule of law that laws must be certain as to their effect.

The upshot was that s 27 of the Interpretation Act 1999 retained the presumption of Crown immunity from statute. However, criticism of s 27 from the Law Society prompted the government to refer the issue back to the Law Commission.¹⁰⁶ This resulted in the 2000 report.

The 2000 report was highly critical of the previous report. First, it strongly disagreed with the recommendation that the presumption should be reversed for existing as well as future legislation; it considered this proposal “so self-evidently unreasonable that it is unnecessary to spend time on it...”¹⁰⁷ Secondly, the report dismissed the concern that the immunity made the existing law uncertain. It asserted that the reversal of the presumption would not “make the law

¹⁰³ Ibid.

¹⁰⁴ See Law Commission, above n. 41, at [8].

¹⁰⁵ Ibid.

¹⁰⁶ At [9].

¹⁰⁷ At [7].

any less uncertain”.¹⁰⁸ Thirdly, the report rejected the Law Society’s argument that reversing the presumption was beneficial because it “would require the Crown to define the exemptions or immunities it considers necessary and to justify them”.¹⁰⁹ According to the report, this was similar to “providing a pupil with an incentive to learning how to keep afloat by throwing him or her overboard”.¹¹⁰ It curtly asserted that “[t]here are better methods.”¹¹¹ The “optimum solution”¹¹² according to the report was to modify drafting practice so that “each new statute should expressly state whether and to what extent the Crown is bound by its provisions and where appropriate spell out the consequential mechanisms.”¹¹³ This has since become drafting practice in New Zealand.

The report’s short dismissals of the previous Law Commission recommendations lack in reasoned criticisms of the reversal of the presumption. A comment in the report that possibly sums up its attitude is that “government must be allowed to govern, and that the nature of government requires the executive to have certain powers and immunities unavailable to the private citizen.”¹¹⁴ Such an attitude overlooks entirely the need for the executive’s powers and immunities to be proportionate to its functional needs and align with other constitutional principles such as the rule of law to the extent possible. As discussed above, the immunity from statute does not address any specific functional need of the executive.

A far more proportionate response is that suggested by the Australian Law Reform Commission:¹¹⁵

¹⁰⁸ Ibid.

¹⁰⁹ At [13], citing the New Zealand Law Society submission dated 3 April 1998, paragraph 18.

¹¹⁰ At [13].

¹¹¹ Ibid.

¹¹² At [14]

¹¹³ At [14].

¹¹⁴ At [10].

¹¹⁵ Australian Law Reform Commission, above n. 82, at [22.47].

[C]onsiderations of transparency and accountability require that in circumstances in which the government determines that it should not be bound by the same law as citizens, the extent of its immunity should be expressly stated. It follows that if executive immunities are removed, Parliament should use its legislative powers to enact provisions that exempt the executive from particular laws or in particular circumstances, where necessary and appropriate.

The Australian Law Reform Commission's approach acknowledges that the executive must be allowed to govern by having specific immunities but also that these immunities should only exist "where necessary and appropriate." Such an approach places the onus on Parliament to specify where it intends the executive to be exempt from a statute; in all other situations, the executive is bound by statute like any private individual or corporation.

Abolishing the presumption of immunity does pose a risk: it could result in a statute binding the Crown notwithstanding the fact that Parliament had intended to exempt the Crown but had not expressly said so in reliance on the presumption. The Law Commission report of 2000 neither expressly recognises this risk, nor considers ways to address it. Reports from other jurisdictions have proposed safeguards that are useful to consider.¹¹⁶

One option is that Parliament could reverse the presumption and retain a provision for courts to find that a statute demonstrates an intention not to bind the Crown. South Australia adopted this approach in 1990 and it was also the preferred approach for the Law Commission in 1990. Section 20(1) of the Acts Interpretation Act 1915 (SA) provides that "...an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown..." The concern with this approach is that there would continue to be uncertainty and disputes surrounding whether or not the statute applies to the Crown. Litigants and the courts would have to grapple with whether a statute exempts the Crown by necessary

¹¹⁶ Ibid. at [26.23] – [26.41]; see also Law Reform Commission of Saskatchewan, above n. 30, at Sections 3.2 and 4.

implication. The Australian Law Reform Commission decided against recommending such an approach for this very reason.¹¹⁷

The second option is to reverse the presumption for statutes enacted after a certain date so that statutes which would have been drafted in reliance on the presumption do not inadvertently bind the Crown. This is the approach in South Australia and Prince Edward Island. In South Australia, the presumption that a statute binds the Crown only applies to statutes enacted after 20 June 1990. In Prince Edward Island, statutes enacted before 1981 retain the presumption of immunity; the presumption is reversed for statutes enacted after the reform.¹¹⁸ However, this approach, too, is unsatisfactory because for a long time, the majority of statutes would continue to operate under the presumption of immunity and all the associated problems would remain. The Australian Law Reform Commission also rejected this approach, noting that “[c]oncern has been expressed that the co-existence of opposing presumptions, without the prospect of future consolidation of the law, might create confusion.”¹¹⁹

A third option is to have different phases for reversing the presumption: any statute enacted after a specified date will be presumed to bind the Crown in the absence of express intention to the contrary and the same presumption will also apply to all existing statutes after a certain timeframe. The advantage of this approach is that it would give the executive and its advisory bodies time to review the existing legislation and enact express immunities for the executive where necessary so that there is no inadvertent disadvantage to the Crown when the presumption is reversed for all statutes. The Australian Law Reform Commission recommended this approach.¹²⁰ The disadvantage is that review of the existing statute will be time-consuming and expensive.

¹¹⁷ Australian Law Reform Commission, above n. 82, at [26.40].

¹¹⁸ Interpretation Act RSPEI 1998 c I-8, s 14.

¹¹⁹ Australian Law Reform Commission, above n. 82, at [26.25].

¹²⁰ At [26.41].

The fourth option is simply to abolish the presumption without any safeguard. This has been the approach in British Columbia and the Australian Capital Territory. Section 14(1) of the Interpretation Act RSBC 1996 c 238 states that “unless it specifically provides otherwise, an enactment is binding on the government.” Similarly, s 121(1) of the Legislation Act 2001 (ACT) provides that “[a]n Act binds everyone...and all governments”. There is little evidence that the reversal of the presumption has posed any difficulty in either of these jurisdictions. Shortly after the reform, British Columbia restored the presumption of immunity in respect of the use or development of land or in the planning, construction, alteration, servicing, maintenance or use of improvements.¹²¹ This was because the Government of British Columbia had historically not regarded itself as being bound by land use and planning legislation and so found it necessary to restore the presumption in that area of law.¹²² Otherwise, even the Law Commission report of 2000 acknowledged that the reversal of the presumption of immunity in British Columbia came to pass “without the skies falling in.”¹²³

It is submitted that the third option is the most suitable for New Zealand. The presumption should be that all statutes bind the executive in the absence of express words to the contrary. This presumption should have immediate effect for all statutes enacted after 2000. This is because the Law Commission’s report of 2000 made it drafting practice for legislation to state expressly whether or not it binds the executive.¹²⁴ For statutes enacted on or before 2000, there should be a specified time-frame, such as a three-year period, for the presumption to come into effect. This will give the executive time to identify and put before Parliament any specific exemptions that it needs in relation to legislation that will otherwise become binding.

Reversing the presumption in this manner would be a significant improvement from the current presumption of immunity. It would achieve greater parity between the executive government

¹²¹ Interpretation Act RSBC 1996 c 238, s 14(2).

¹²² Law Reform Commission of Saskatchewan, above n. 30, at 18, 21 – 22.

¹²³ Law Commission, above n. 41, at [7].

¹²⁴ At [11].

and litigants in proceedings against the government. The fact that Parliament would have to expressly provide that it intends to exempt the executive from a certain statute would prompt greater scrutiny and transparency of the need for the immunity. The uncertainty about whether or not a statute binds the Crown would no longer complicate the issues at a proceeding: to this end, it is important that only express words can displace the presumption that a statute binds the executive and that there should be no scope for a “necessary implication” of exemption. It is also proposed that a statute that intends to exempt the executive should identify precisely which entities it intends to exempt. For example, a statute may exempt government departments and Crown agents as defined in s 7(1)(a) of the Crown Entities Act 2004 but not other Crown entities. Such specificity is preferable to making “the Crown” exempt from the statutes, as is current practice, because it would avoid the need to ask whether an entity is “the Crown” in a proceeding. Further, it is open to Parliament to amend a statute once it realises that the statute was not intended to bind the executive. If a case is sufficiently serious, the amendment may have retrospective effect.

9.4. Conclusion

The presumption that the Crown is exempt from statute is the result of an historic accident and has no modern justification. It is an unprincipled deviation from the rule of law. The presumption creates significant uncertainty because courts struggle to interpret whether a statute binds the Crown by “necessary implication” and whether an entity claiming the immunity from statute is the Crown. The only reason the presumption has persisted notwithstanding these issues is because of inertia induced by fears that there will be unintended consequences for statutes that do not expressly exempt the Crown.

It is submitted that New Zealand should abolish the presumption of exemption as part of the proposed reform of its State theory. An adequate safeguard against the risk of unintentional consequences for the executive is to abolish the presumption in two stages: statutes enacted after 2000 will be presumed to bind the executive with immediate effect because the prevalent drafting practice since 2000 has been for statutes to state expressly whether or not they bind the

Crown. Statutes enacted on or before 2000 will also become binding on the executive after a certain time-frame so as to give Parliament the opportunity to preserve any specific exemptions that are necessary and appropriate.

Chapter 10: Executive empowerment and the Crown

10.1. Overview

Executive action derives authorisation from three sources: statute, the royal prerogative and residual freedom.¹ Statute derives from Parliament while the royal prerogative and residual freedom derive from the Crown. This chapter argues that the sources of authorisation deriving from the Crown are conceptually more difficult to justify and should be replaced with statutory empowerment.

A short historical overview demonstrates the Crown's diminishing relevance to authorising executive action. The royal prerogative was the dominant source of executive empowerment until the early 19th century. However, statute has since superseded the prerogative. Statutory powers vest in individuals and entities rather than the Crown.

The royal prerogative is now a small subset of executive powers. However, it poses several problems. The definition and scope of the prerogative are uncertain. There are also concerns about the democratic accountability for the exercise of the prerogative, as actions based on the prerogative do not need parliamentary pre-approval for legal effect.

Residual freedom poses further challenges. It confers on the Crown the freedom of private individuals to act without positive legal authorisation. The executive's exercise of residual freedom can limit individual liberties. Further, residual freedom potentially enables the executive to supplement the scope of its statutory empowerment.

¹ Mark Elliott and Robert Thomas *Public law* (2nd ed, Oxford University Press, Oxford, 2014) at 150; B V Harris "The 'third source' of authority for government action revisited" (2007) 123 LQR 225; B V Harris "Government 'third source' action and common law constitutionalism" (2010) 126 LQR 373; B V Harris "Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26 NZULR 60.

It is submitted that the prerogative and residual freedom are no longer appropriate sources of executive power. There should be a requirement of positive statutory authorisation for all executive action. Such authorisation should also extend to actions that are reasonably incidental to the achievement of a statutory purpose.² Sourcing all executive action in statute would promote clarity and democratic accountability. Further, it would make the Crown entirely redundant to explaining executive power.

10.2. The Crown's diminishing relevance to executive empowerment

The Crown, as synonym for the Sovereign, was the source of the majority of executive power until the early 19th century. This was because offices and departments of government came into existence through the exercise of the prerogative rather than through legislation. Moore writes that “[a]s a matter of history it is easy to connect a great part of the organs of public government in England with the use and service of the Crown, from which they have emanated and on which they have depended.”³ The Chancellor and Chancery, the Secretaries of State and the Departments of State, the Privy Council, the boards of trade, education, agriculture and local government, were “means of declaring the King’s will”⁴ and “means of carrying out powers or exercising rights assigned to the King in the government of the country.”⁵

The Crown’s significance as the source of executive power began to diminish after the electoral reform in 1832,⁶ when statutes began to replace the royal prerogative as the instrument for authorising executive action.⁷ New offices that were created by statute rather than by prerogative “increas[ed] in number and variety.”⁸ Maitland wrote in 1919, “To a very large extent indeed England is now ruled by means of statutory powers which are not in any sense...the

² Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 643.

³ W Harrison Moore “Liability for acts of public servants” (1907) 23 LQR 12 at 16.

⁴ Ibid.

⁵ Ibid.

⁶ Reform Act 1832 (UK).

⁷ FW Maitland *The Constitutional History of England* (Cambridge University Press, London, 1919) at 417.

⁸ Moore, above n. 3, at 17.

powers of the king.”⁹ Statutes, unlike the prerogative, derived from Parliament and not the Crown. The Revolution Settlement and Bill of Rights 1689 had delineated the different jurisdictions of Parliament and the king: Blackstone had described Parliament as holding “supreme legislative power”¹⁰ and the Sovereign, “supreme executive power”.¹¹ The increasing use of statutes to empower the executive made Parliament the source of both legislative and executive power.

The legislative formula for empowering the executive mostly circumvented the Crown. Statutes conferred powers on specified officers or entities rather than empowering the Crown directly.¹² Officers carrying out statutory duties were “officers of Parliament” rather than “officers of the Crown” even though they were carrying out executive functions. For example, in *Tobin v R*,¹³ one of the reasons why the Crown was not vicariously liable for the tortious actions of a captain of the Royal Navy was that the captain was “not acting in obedience to a command of Her Majesty but in the supposed performance of a duty imposed upon him by act of parliament.”¹⁴ This treated the captain’s actions – although executive in nature – as falling outside the Crown’s domain because it is Parliament who empowered the captain. Likewise, courts granted mandamus against executive officers on numerous occasions on the basis that the officers were not representing the Crown (in which case they would enjoy the Crown’s immunity) but carrying out statutory duties. In *R v Lords Commissioners of Treasury*, Lord Denman CJ stated:¹⁵

[The Lords Commissioners of the Treasury] are officers under the Crown, but the Crown has no more to do with them, for this purpose, than with any other officers. They are merely parties

⁹ FW Maitland *The Constitutional History of England* (Cambridge University Press, London, 1919) at 415.

¹⁰ William Blackstone and Edward Christian (ed) *Commentaries on the Laws of England* (12th ed, A. Strahan and W. Woodfall, London, 1793) at 338.

¹¹ Ibid.

¹² Maitland, above n. 9, at 415-418; William Wade “The Crown – old platitudes and new heresies” (1992) 142 NLJ 1275 at 1276.

¹³ *Tobin v R* (1864) 16 CB (NS) 310; 143 Eng. Rep. 1148.

¹⁴ At 1162.

¹⁵ *R v Lords Commissioners of Treasury* (1835) 4 AD & E 284; 111 Eng. Rep. 794 at 797.

who have received a sum of money as trustees for an individual, under the provisions of an Act of Parliament

These judgments treated executive functions of statutory origin as falling outside the ambit of the concept of the Crown.

The drafting practice of empowering individual officers and entities rather than the Crown has continued into the 21st century. Most statutory powers now vest in ministers as *persona designata* and exist independently of the concept of the Crown. Wade writes that the “vast majority of powers...belong to ministers, not to the Crown...”¹⁶ English courts regularly uphold the argument that powers vested in designated ministers are subject to mandatory orders because they are not the Crown’s powers.¹⁷ In New Zealand, too, “in the overwhelming majority of cases the determinative power is vested in a minister or other officer” rather than in the Crown.¹⁸

The upshot is that the Crown has a much smaller role than statute in empowering the executive in both the United Kingdom and New Zealand. Courts refer to the sources of executive power that derive from the Crown as “residual” in nature.¹⁹ The ambit of these residual Crown powers can only diminish. Parliament’s sovereignty means that Parliament can at any time legislate in areas of executive action that have until then been governed by prerogatives or residual freedom.²⁰

¹⁶ Wade, above n. 12, at 1276.

¹⁷ For example, see *R v Secretary of State, ex parte Herbage* [1986] 3 All ER 210; *M v Home Office* [1994] 1 AC 377; in general, see discussion in Section 8.3.2.3.

¹⁸ Law Commission *Mandatory orders against the Crown and tidying judicial review* (NZLC SP 10, 2001) at [46].

¹⁹ For example, see *R (on the application of Miller) v Secretary of State for exiting the European Union* [2017] UKSC 5 at [47] – [48] [“Supreme Court of the United Kingdom in *Miller*”]; see also *R (on the application of Miller) v Secretary of State for exiting the European Union* [2016] EWHC 2768 (Admin) at [24]; *Singh v Refugee Status Appeal Authority* HC Auckland M1224/93, 22 October 1993, at 24.

²⁰ Supreme Court of the United Kingdom in *Miller*, above n. 19, at [48]; *Singh*, above n. 19, at 24.

The wider political context of the Crown's diminishing relevance to executive power is the idealisation of democratic legitimisation. A 2007 Green Paper of the British Government commented:²¹

For centuries the executive has, in certain areas, been able to exercise authority in the name of the monarch without the people and their elected representatives in their Parliament being consulted. This is no longer appropriate in a modern democracy. The Government believes that the executive should draw its powers from the people, through Parliament.

The same principle applies within the New Zealand context. Harris writes that "modern democratic society should aspire to provision through Parliament of those legal authorities which the government needs in order to perform all the functions society wants and expects it to perform."²² The emphasis on democratic legitimation points, unsurprisingly, to statute as the preferred source of executive empowerment compared to the prerogative and residual freedom. Statutes derive from the people's elected representatives whereas the Crown's prerogative and residual freedom are what remain of the powers and freedoms of a once-autocratic king.²³

10.3. The royal prerogative

The royal prerogative is the residue of the Sovereign's discretionary executive powers. These powers belong to the Sovereign at law but the executive controls their exercise. Executive control takes two forms: either the Sovereign (or her representative, the Governor-General) exercises these powers on ministerial advice, or else ministers exercise these prerogatives on the

²¹ Ministry of Justice *Limiting the power of the executive: the governance of Britain* (CM 7170, 2007) at [14].

²² B V Harris "Replacement of the royal prerogative in New Zealand" (2009) 23 NZULR 285 at 287.

²³ Joseph, above n. 2, at 643.

Sovereign's behalf.²⁴ The exercise of the prerogative does not require legislative authorisation.²⁵

A non-exhaustive list of the Sovereign's prerogatives are:²⁶

1. the right to be consulted, to encourage and to warn;
2. immunities and privileges (for example, the presumption that statutes do not bind the Crown unless expressly stated);
3. the power to summon, prorogue and dissolve Parliament;
4. the power to appoint officers;
5. the prerogative in external affairs (for example, the power to make treaties);
6. defence and wartime prerogatives (for example, the power to declare war);
7. the prerogative of keeping the peace;
8. eminent domain;
9. conferment of honours;
10. the right of royal assent;
11. the prerogative of mercy;
12. prerogatives in the administration of justice (for example, the power to stay proceedings); and
13. the reserve powers to act without, or contrary to, ministerial advice.

This section contends that the prerogative is in several respects unsatisfactory as a source of executive power. First, it is unclear whether the prerogative by definition comprises only those non-statutory powers that are unique to the Sovereign or includes all non-statutory forms of authorisation. Secondly, the number and scope of surviving prerogatives are contentious. Thirdly, the prerogative co-exists uncomfortably with the ideal of democratic legitimisation of executive authority because it subsists independently of parliamentary authorisation.

²⁴ Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand* (Auckland University Press, Auckland, 2017) at 39 – 40; Anne Twomey *The veiled sceptre* (Cambridge University Press, Cambridge, 2018) at 5.

²⁵ Twomey, above n. 24, at 4 – 5.

²⁶ At 5; Joseph, above n. 2, at Ch 18 and Ch 19; Gail Bartlett and Michael Everett *Briefing paper - The royal prerogative* (Number 03861, 2017) at 9 – 12.

It is submitted that the New Zealand Parliament should clarify the scope of prerogative powers and re-source these in legislation. This would bring certainty about the scope of executive authority and provide a democratic foundation for these powers.

10.3.1. Disputed definition

There are two conflicting understandings of the prerogative: the “Blackstonian” and the “Diceyan”. The Blackstonian definition holds that the prerogative comprises non-statutory powers that are unique to the Crown.²⁷ This is based on Blackstone’s description of prerogatives as “those rights and capacities which the King enjoys alone, in contradiction to others, and not...those which he enjoys in common with any of his subjects.”²⁸ Wade, a supporter of the Blackstonian definition, suggests that an additional requirement for a power to qualify as a prerogative is that its exercise must produce a legal effect at common law.²⁹ However, other academics disagree with this additional requirement and simply endorse the Blackstonian definition.³⁰

The Diceyan definition of the prerogative is significantly broader. It equates the prerogative with all non-statutory powers of the executive.³¹ Dicey described the prerogative as “[t]he residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”³² This definition does not distinguish between the powers that are unique to the Crown

²⁷ William Wade “Crown, ministers and officials: legal status and liability” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 23 at 30; Joseph, above n. 2, at 649; Gretchen Carpenter “Prerogative powers – an anachronism?” (1989) 22(2) *The Comparative and International Law Journal of Southern Africa* 190 at 192; Elliott and Thomas, above n. 1, at 173; *Re Residential Tenancies Tribunal (NSW) and Henderson; ex parte Defence Housing Authority* [1997] HCA 36 at fn 58, per Dawson, Toohey and Gaudron JJ.

²⁸ Blackstone, above n. 10, at 239.

²⁹ William Wade “Procedure and prerogative in public law” (1985) 101 LQR 180 at 193.

³⁰ See Harris, above n. 22, at 291; Elliott, above n. 1, at 146 – 149.

³¹ See Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carsewell, Toronto, 2011) at 19; Sebastian Payne “The royal prerogative” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown* (Oxford University Press, Oxford, 1999) 77 at 81.

³² AV Dicey *Introduction to the study of the law of the constitution* (10th ed, MacMillan, London, 1959) at 424.

and the Crown's residual freedom to do anything that ordinary individuals can. The Diceyan definition therefore subsumes the Crown's residual freedom within the concept of prerogative power.

Some academics consider that the difference between the Blackstonian and Diceyan definitions has no practical ramification because courts have jurisdiction to review any non-statutory power.³³ Historically, the exercise of non-statutory powers was outside the scope of judicial review³⁴ and there was a concern that the broader Diceyan definition of the prerogative might suppress any judicial inclination to reform the law and start reviewing prerogative powers. Wade wrote that "[i]t may well be easier to extend [judicial] control to the few genuine prerogative powers...if the court is not by the same token committed to extend it to all sorts of pretended prerogatives..."³⁵ This concern ceased to be valid after the House of Lords decided that non-statutory powers were reviewable in *Council of Civil Service Unions v Minister for the Civil Service (GCHQ decision)*.³⁶ Wade subsequently acknowledged that the "the GCHQ decision may, indeed, be regarded as ruling out the distinction which Blackstone made"³⁷ between non-statutory powers unique to the Sovereign and non-statutory powers shared by the Sovereign and her subjects alike.

However, there may still be a practical reason to prefer the Blackstonian definition. The Diceyan definition conflates the prerogative and residual freedom and thus overlooks an important

³³ Joseph, above n. 2, at 651-652; Wade, above n. 27, at 31; G Winterton "The limits and use of executive power by government" [2003] Federal Law Review 17.

³⁴ For example, see *Attorney-General v De Keyser's Royal Hotel* [1920] All ER 80; [1920] AC 508 (HL) at 549, *per* Lord Moulton; *China Navigation Company Ltd v Attorney-General* [1932] 2 KB 197 at 214 – 215, *per* Scrutton LJ; *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70 at 88, *per* Viscount Dilhorne.

³⁵ William Wade *Constitutional Fundamentals* (Stevens, London, 1980) at 49.

³⁶ *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935 (HL) [GCHQ decision]; adopted by the New Zealand Court of Appeal in *Burt v Governor-General* [1992] 3 NZLR 672 (CA). The present legal position in New Zealand is that any exercise of prerogative power is reviewable subject to considerations of justiciability and the nature and quality of the power concerned: see, for example, *Pora v Attorney-General* [2017] NZHC 2081 at [83] – [103]; *Rewa v Attorney-General* [2018] NZHC 1005 at [34] – [39].

³⁷ Wade, above n. 27, at 31.

distinction between the two. Residual freedom does not authorise the executive to act in any way that contravenes another person's rights.³⁸ On the other hand, the executive can exercise the prerogative to override individuals' legal rights to the extent permitted by common law.³⁹ Misclassifying residual freedom as a prerogative can lead a court incorrectly to conclude that the executive has the authority to override a legal right when in fact it does not. This concern has not yet materialised in New Zealand. However, the potential exists for the Diceyan definition of the prerogative to compromise individual rights. In *Williams v Commonwealth (No 1)*, Crennan J of the High Court of Australia endorsed the Blackstonian definition on the ground that "[t]his restrained approach to the prerogative is consistent with...respect under our democratic system of government for the common law rights of individuals."⁴⁰

This thesis uses the Blackstonian definition of the prerogative to distinguish between the prerogative and residual freedom. This allows the thesis to examine separately the distinct issues posed by the prerogative and residual freedom and adopt different proposals for reform.

10.3.2. Uncertain scope

English courts have long recognised that they cannot create new prerogatives.⁴¹ In *Case of Proclamations*, Sir Edward Coke announced (boldly for that time) that "the King hath no prerogative, but that which the law of the land allows him."⁴² Diplock LJ observed wryly in *BBC v Johns* that it was "350 years and a civil war too late for the Queen's courts to broaden the royal prerogative."⁴³

³⁸ Harris (2007), above n. 1, at 226 and 227.

³⁹ At 228, , citing *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; see also the Supreme Court of the United Kingdom in *Miller*, above n. 19, at [52].

⁴⁰ *Williams v The Commonwealth (No 1)* (2012) 248 CLR 156 at [448].

⁴¹ *Case of Proclamations* (1611) 12 Co Rep 74.

⁴² At 76.

⁴³ *BBC v Johns* [1965] Ch 32 at 79.

The legal position is less certain in New Zealand. New Zealand commentators accept that courts cannot recognise new prerogatives on the basis of the English decisions.⁴⁴ However, Baragwanath J was “minded to reject” the view “that the Crown may not exercise prerogative powers beyond those that can be traced into ancient history.”⁴⁵ His Honour considered that “the Executive must have whatever powers are reasonably required to discharge its manifold functions, so long as it does not infringe the law and can secure supply.”⁴⁶ His Honour’s comments suggest that courts can recognise new prerogatives. While other courts have not expressly endorsed this view, Baragwanath J’s comments are a source of uncertainty about the scope of the prerogative.

A second source of uncertainty is the controversy regarding whether prerogatives “die” with disuse or simply become dormant until revived. The historical prerogatives of the Crown covered diverse subjects but many of these have fallen into disuse.⁴⁷ Bradley and Ewing consider that these prerogatives are dormant but alive, as “rules of common law do not lapse through desuetude.”⁴⁸ Wade and Forsyth submit, on the other hand, that prerogative powers can become “atrophied by mere disuse.”⁴⁹ Harris agrees with Bradley and Ewing but argues that courts should nonetheless disallow the exercise of prerogatives that have fallen into disuse because of the vastly different context in which the executive would have exercised these prerogatives historically.⁵⁰ By contrast, Joseph argues that prerogative powers are inherently adaptable and that their “content...changes as the essential needs of government changes.”⁵¹ As

⁴⁴ Harris, above n. 22, at 298; Joseph, above n. 2, at 646.

⁴⁵ *Attorney-General v Mair* [2009] NZCA 625 at [169]; see also his Honour’s prior decision in *Daniels v Attorney-General* HC AK M 1615-SW99, 3 April 2002, at [47] – [50].

⁴⁶ *Ibid.*

⁴⁷ Bartlett and Everett, above n. 26, at 9.

⁴⁸ A Bradley and K Ewing *Constitutional and administrative law* (16th ed, Pearson Longman, New York, 2015) at 260 – 1.

⁴⁹ William Wade and Christopher Forsyth, Christopher *Administrative law* (14th ed, Oxford University Press, London) at 179.

⁵⁰ Harris, above n. 22, at 301.

⁵¹ Joseph, above n. 2, at 647.

a result, it is difficult to enumerate the surviving prerogatives. The executive can potentially fall back on obsolete prerogatives to legitimise actions unauthorised by statute.

The uncertainty about the number of prerogatives in existence is undesirable. It makes the ambit of executive authority difficult to determine. It also opens an avenue for the executive to bypass the parliamentary process to obtain authorisation for matters that need positive legal authorisation. Harris writes that the executive can potentially “trawl through the ancient prerogative in search of a potentially adaptable authority rather than have the current Parliament give its democratic mandate to the creation and limitation of the needed power.”⁵² He considers this “fundamentally wrong and undemocratic”.⁵³

The complex interplay between statutes and prerogatives is a further source of uncertainty about the scope of the prerogative. Statutes affect many areas of executive activity that formerly relied on the prerogative alone. It is difficult to ascertain whether a statute has supplanted or limited the scope of a prerogative power or whether the prerogative supplements the scope of statutory authority. The ensuing paragraphs discuss this issue.

Courts agree that Parliament can, by legislation, abolish a prerogative or place the prerogative in abeyance. Lord Parmoor stated in *Attorney-General v De Keyser's Royal Hotel Ltd* that:⁵⁴

[w]here a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

⁵² Harris, above n. 22, at 303.

⁵³ Ibid.

⁵⁴ *De Keyser*, above n. 34, at 575.

Likewise, the Court of Appeal of England and Wales has held that the exercise of prerogative powers cannot frustrate a statutory provision.⁵⁵ The executive cannot exercise a prerogative to “achieve by...the back door that which cannot lawfully be achieved by entry through the front.”⁵⁶

However, courts are loth to find that a statute has abolished or replaced a prerogative in the absence of a “very clear intention.”⁵⁷ Several New Zealand cases illustrate this tendency. The Court of Appeal held in *Cock v Attorney-General* that the Commission of Inquiry Act 1908 did not limit the Governor’s power to constitute a commission of inquiry under the prerogative.⁵⁸ In *Peerless Bakery Ltd v Clinkard (No 3)*, the Supreme Court found that the power to create a corporation under the Board of Trade Act 1919 did not abridge the prerogative power of creating a corporation.⁵⁹ Again in *Simpson v Attorney-General*, the Court of Appeal determined that the provision for summoning Parliament under the Electoral Act 1927 did not limit the prerogative of summoning Parliament.⁶⁰ The prerogatives and statutes co-existed in these instances.

The co-existence of statutes and prerogatives in a related area of law will almost invariably create interpretive uncertainty about the scope of executive power. The Crown is likely to argue that Parliament did not intend the statute to replace or limit the prerogative without express words, so that the prerogative continues to supply any such power that the statute has omitted to include. Conversely, the party opposing the Crown in the proceeding is likely to contend that Parliament’s decision to legislate must mean that it intended the statute to set the scope of the power. The prerogative should not therefore be used to circumvent the limitations within the statute.

⁵⁵ *Laker Airways v Department of Trade* [1977] QB 643 (CA).

⁵⁶ A 722, per Roskill LJ; see also *R v Secretary of State for the Home Department; ex parte Northumbria Police Authority* [1989] 1 QB 26 at 44.

⁵⁷ Twomey, above n. 24, at 8, quoting S A de Smith and Rodney Brazier *Constitutional and administrative law* (8th ed, Penguin, London, 1998) at 139 – 140; see also Joseph, above n. 2, at 674 – 677.

⁵⁸ *Cock v Attorney-General* (1909) 28 NZLR 405 (CA); see also *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 260 – 262.

⁵⁹ *Peerless Baker Ltd v Clinkard (No 3)* [1953] NZLR 796 (SC) at 800 – 801.

⁶⁰ *Simpson v Attorney-General* [1955] NZLR 271 (CA) at 280 – 282.

Two recent English cases illustrate this interpretive uncertainty. *R (on the application of Miller) v Secretary of State for Exiting the European Union* concerned the ability of the Government of the United Kingdom to trigger Article 50 of the Treaty of European Union to withdraw from the European Union.⁶¹ The Government argued that it could activate Article 50 without parliamentary consent because treaty-making was a prerogative power and nothing in the European Communities Act 1972 expressly or by necessary implication abrogated the prerogative to withdraw from Treaties. The Supreme Court of the United Kingdom rejected this argument by a majority of 8:3. It held that Parliament could not have intended the Government to be able to exercise its prerogative to withdraw from the European Union when it enacted the European Communities Act.⁶² The Court stated that “[i]t is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute.”⁶³

The decision in *Miller* contrasts with the Court of Appeal’s approach in *R (on the application of XH and AI) v Secretary of State for the Home Department*.⁶⁴ The appellants in that case argued that the Secretary of State no longer had the prerogative power to cancel a passport because the Terrorism Prevention and Investigation Measures Act 2011 omitted that power. The Act only provided that the Secretary of State could require an individual to surrender his or her passport and not to seek obtain a passport without permission. The Court of Appeal of England and Wales rejected the appellants’ argument. It held that the test for whether a statute abolished a prerogative was strict. It was unlikely that Parliament had overlooked that the power to cancel a passport existed or had intended to abolish the power.⁶⁵ The omitted power remained exercisable as a prerogative power.

⁶¹ Supreme Court of the United Kingdom in *Miller*, above n. 19.

⁶² At [77] – [89].

⁶³ At [48].

⁶⁴ *R (on the application of XH and AI) v Secretary of State for the Home Department* [2017] EWCA Civ 41.

⁶⁵ At [91].

The above examples suggest that the judicial willingness to allow a statute to set the ambit of executive power can turn on a court's perception of the appropriateness of the executive's functions. A strict approach is more likely where a statute appears to leave a deficit in the executive's powers compared to the powers available under the prerogative, so that the prerogative can supplement the scope of the statute. By contrast, a court may be more likely to find that a statute abrogates a prerogative where the exercise of the prerogative could undermine democratic principles.

It is submitted that the judicial use of prerogatives to fill the gaps left by statute is unideal. It creates uncertainty about the scope of executive power. It also calls upon the courts to make a policy judgment as to whether an executive function omitted in a statute is necessary or desirable so that the prerogative should continue to authorise it. However, courts have no alternative at present because legislation that touches upon a prerogative is often piecemeal and does not comprehensively replace the prerogative.

A preferable approach would be for Parliament to replace the existing prerogatives with comprehensive statutory provisions that courts and the general public can treat as determinative of the scope of executive power. This would enhance certainty about the scope of executive power.

10.3.3. Undemocratic nature

A major criticism of the prerogative is that it is undemocratic in nature.⁶⁶ Statutory powers reflect a conscious decision by a majority in Parliament to empower the executive. By contrast,

⁶⁶ Harris, above n. 22, at 287 - 288; Andrew Butler and Geoffrey Palmer *Towards Democratic Renewal* (Victoria University Press, Wellington, 2018) at 314; David Williams "Crown prerogative: Reigning in the powers" in Cris Shore and David Williams (eds) *The shapeshifting Crown – Locating the State in postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press, Cambridge, 2019) 203 at 206, 207, 220; Adam Tomkins *Our republican constitution* (Hart Publishing, Oxford, 2005) at 132.

prerogative powers are remnants of the Sovereign's self-proclaimed authority that his subjects once accepted out of "awe and fear".⁶⁷ To quote Phillipson:⁶⁸

[T]he prerogative is, of course, a residue of royal power. Hence the prerogative powers have never been granted by any deliberate or democratic decision to the Executive. Instead they have been, in effect, inherited by Ministers from the residual powers of an unelected hereditary Monarch.

Many commentators regard statute's replacement of the prerogative as a justified subjugation of hereditary power by democratic power.⁶⁹ Lord Browne-Wilkinson observed in *R v Home Secretary, ex parte Fire Brigades Union* that "the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature of the sovereign body."⁷⁰ Endicott notes that the modern tendency is to treat the executive's prerogative power as "something to be taken away, and not something that calls for (and may have) a justification."⁷¹

For Harris, the absence of a mechanism for parliamentary pre-approval is a key shortcoming of the prerogative power.⁷² Statutory authorisation has an inbuilt pre-action parliamentary approval in that Parliament enacts the statute that confers authority on the executive. By contrast, Parliament can only hold ministers to account for the exercise of a prerogative after the event. Harris argues that this is "never...a complete substitute for pre-action parliamentary authorisation."⁷³

⁶⁷ Timothy Endicott "Parliament and the prerogative: from the *Case of Proclamations* to *Miller*" *Judicial Power Project* (United Kingdom, 1 December 2016) at 8.

⁶⁸ Gavin Phillipson "Brexit, prerogative and the courts: why did political constitutionalists support the government side in *Miller*?" (2017) 36(2) *University of Queensland Law Journal* 311 at 314.

⁶⁹ Ministry of Justice, above n. 21, at [14].

⁷⁰ *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 513 at 552.

⁷¹ Endicott, above n. 67, at 12 – 13.

⁷² Harris, above n. 22, at 287 – 288.

⁷³ At 303.

The importance of parliamentary pre-approval has come to the forefront in the context of the war prerogative. The executive has the power to deploy troops abroad without parliamentary pre-approval. In 2003, the British Government exercised the prerogative to invade Iraq (albeit Parliament at the time also voted in support).⁷⁴ The decision was hugely controversial and it subsequently emerged that there were numerous failings in the way the Government exercised the prerogative.⁷⁵ The episode prompted a wide-scale review of prerogative powers in the United Kingdom.⁷⁶ It resulted in the statutory replacement of several prerogative powers.⁷⁷ The power to declare war remains a prerogative because of a concern that prescribing a statutory procedure for parliamentary involvement might give rise to legal action.⁷⁸ However, it is now conventional for the Government to treat Parliament's decision on deployment as final, instead of seeking to rely on the prerogative power.⁷⁹ The shift from the prerogative to a parliament-centric mechanism for declaring war vindicates the concern about the undemocratic nature of the prerogative. It also conforms with the recommendation of one commentator that parliamentary pre-approval should be a precondition for the decision to engage in warfare.⁸⁰

One might question the contention that prerogatives are undemocratic by pointing to the role of the prerogative in the aftermath of the 2016 "Brexit" referendum. The 2016 referendum returned a 52:48 majority vote in favour of "Brexit", that is, the position that the United Kingdom should leave the European Union. The Government intended to give effect to this mandate by relying on the prerogative to trigger Article 50 of the Treaty on European Union. This would have allowed the United Kingdom to exit the European Union without legislative change. The Supreme Court in *Miller*⁸¹ found that legislative change was necessary to trigger Article 50. However, the

⁷⁴ At 286, fn 12.

⁷⁵ Williams, above n. 66, at 213 – 215.

⁷⁶ Ibid.

⁷⁷ See Constitutional Reform and Governance Act 2010 (UK).

⁷⁸ Williams, above n. 65, at 216, quoting Bartlett and Everett, above n. 26, at 20.

⁷⁹ At 215 – 216, quoting Bartlett and Everett, above n. 26, at 19.

⁸⁰ See, for example, Rosara Joseph *The war prerogative* (Oxford University Press, Oxford, 2013) at 179 – 180 and 186.

⁸¹ Supreme Court of the United Kingdom in *Miller*, above n. 19.

anti-Brexit sentiment within Parliament meant that the exercise of the prerogative would have been a more immediate way to give effect to the mandate of the majority compared to legislative change.⁸² As a result, many “political constitutionalists” (who typically prefer democratic decision-makers to take policy decisions) extended their support for the use of the prerogative to achieve Brexit.⁸³

It is submitted that the Brexit debate is an atypical scenario and does not render the prerogative a democratic source of power in general. The prerogative only appeared to be a more “democratic” option than legislation in this instance because of the disjuncture between the majority view in Parliament and the (slim) majority view of the voters in the referendum. Indeed, one could argue that legislation was ultimately the more “democratic” option than allowing the Government to use the prerogative. Phillipson submits that the Supreme Court’s decision in *Miller* was a “vindication” of democratic principles.⁸⁴ It ensured that “the sovereign Parliament was in the driving seat over the constitutionally critical issue of Brexit.”⁸⁵

Endicott also challenges the criticism that prerogatives are undemocratic.⁸⁶ He submits that the executive in the 21st century “is itself democratic”.⁸⁷ It is responsible to Parliament and to the wider public at general elections.⁸⁸ The executive is also “necessary for the public good.”⁸⁹ It manages the Police and military and gives effect to legislation and judicial decisions.⁹⁰ In Endicott’s view, there is no good reason why the executive should not have powers independently of Parliament as long as these powers are subject to appropriate controls.⁹¹ He

⁸² Philip Joseph, Professor of Law “Brexit: a view from afar” (School of Law Seminar Series, University of Canterbury, Christchurch, 9 September 2016).

⁸³ Phillipson, above n. 68, at 314.

⁸⁴ At 331.

⁸⁵ Ibid.

⁸⁶ Endicott, above n. 67.

⁸⁷ At 19.

⁸⁸ At 19 – 20.

⁸⁹ At 15.

⁹⁰ At 15 – 16.

⁹¹ At 24.

accepts that it is appropriate to take away specific prerogative powers from the executive when it cannot exercise those powers responsibly.⁹² He cites the historical prerogatives of lawmaking and adjudicating as examples of powers that were justly taken away from the executive branch.⁹³ However, Endicott submits that there is no reason why all prerogative powers should be taken away from the executive.⁹⁴ He concludes that prerogative powers may be “unspecified and undertheori[s]ed”⁹⁵ but operate “tolerably well”⁹⁶ if subject to appropriate controls.

It is submitted that Endicott’s defence of the prerogative fails to attach adequate importance to its undemocratic conceptual foundation. While the executive which controls the prerogative is now “democratic”,⁹⁷ the prerogative itself is pre-democratic and archaic. It is the residue of the once-autocratic Sovereign’s powers. Many jurisdictions recognise non-statutory executive power (including royal power) but source this power in a codified constitution;⁹⁸ non-statutory power therefore has an express democratic basis in these jurisdictions. By contrast, prerogative powers in New Zealand have never undergone democratic scrutiny. They derive legitimacy from the common law and the Letters Patent.⁹⁹ The former is a product of history and judicial determination and the latter is an order issued by the monarch. Harris is correct to call the prerogative an “untidy anachronism”¹⁰⁰ in a 21st century liberal democracy.

10.3.4. Replacing prerogative powers

The uncertain scope and undemocratic foundation of the prerogative have prompted many academics to propose reform. Two options emerge from these proposals: re-sourcing the

⁹² At 16.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ At 24.

⁹⁶ Ibid.

⁹⁷ At 19.

⁹⁸ For example, see United States Constitution, Article 2; Constitution of Ireland, Article 13; Constitution of South Africa 1996, s 85; Commonwealth of Australia Constitution Act 1900, s 61; Constitutional Act of the Kingdom of Denmark 1953, ss 12 – 14.

⁹⁹ Letters Patent Constituting the Office of Governor-General 1983.

¹⁰⁰ Harris, above n. 22, at 313.

prerogative in a codified constitution¹⁰¹ or replacing the prerogative by statute.¹⁰² This section considers statutory replacement to be the more feasible option in New Zealand.

A codified constitution can vest powers directly in the executive. For example, s 61 of the Commonwealth of Australia Constitution Act 1900 provides that:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

The executive power of the Commonwealth includes the prerogatives of the Crown.¹⁰³

Re-sourcing prerogative power in a codified constitution would have several benefits. It would enable executive power to exist independently of legislation while creating a democratic basis for the existence of the prerogative. Framers of a codified constitution would have the opportunity to draft the prerogative powers in a manner that clarifies their scope and avoids the present uncertainties.

However, it is difficult to foresee if and when New Zealand will adopt a codified constitution. Past proposals for a codified constitution have floundered.¹⁰⁴ Recent proposals are premised on New Zealand becoming a republic.¹⁰⁵ While republicanism is arguably inevitable in the long run, there

¹⁰¹ Butler and Palmer, above n. 66, at 314; Quentin-Baxter and McLean, above n. 24, at 318.

¹⁰² Harris, above n. 22, at 308 – 313; Tomkins, above n. 66, at 132.

¹⁰³ *Barton v The Commonwealth* (1974) 131 CLR 477 at 498, *per* Mason J; see Max Spry “The executive power of the Commonwealth: its scope and limits” (Research Paper 28, 1995 – 96).

¹⁰⁴ Joseph, above n. 2, at 140 – 142, citing G Palmer and M Palmer *Bridled power* (4th ed, Oxford University Press, Melbourne, 2004), Appendix; Constitutional Arrangements Committee “Inquiry to review New Zealand’s existing constitutional arrangements” [2005] AJHR I24A; “Report on public petitions M to Z Committee” [1961] AJHR I2 – I2A; L Cleveland and AD Robinson (eds) *Readings in New Zealand Government* (Reed Education, Wellington, 1972) at 220 – 245; JF Northey “The New Zealand Constitution in JF Northey (ed) *The A G Davis essays in law* (Butterworths, London, 1965) 149 at 173.

¹⁰⁵ Butler and Palmer, above n. 66, at 314; Quentin-Baxter and McLean, above n. 24, at 318 and 335.

is no sign that New Zealand will abolish the monarchy in the foreseeable future.¹⁰⁶ For these reasons, the reform of the prerogative should not be contingent on a codified constitution.

Harris has developed a detailed proposal for replacing the prerogative with statute.¹⁰⁷ The ensuing paragraphs summarise his proposal (setting it out as a five-step approach for clarity) and recommend changes that should simplify the process. This section does not address Harris's proposal to retain residual freedom as a non-statutory source of executive authorisation; that is the subject of separate consideration under Section 10.4, below.

Statutory replacement of prerogative powers has been a “slowly ongoing” process.¹⁰⁸ Harris submits that the remaining prerogatives should be replaced “more deliberately and comprehensively over a managed and finite period of time.”¹⁰⁹ The first step would be for the executive to compile a “comprehensive list of needed authorities”¹¹⁰ to fulfil “all the types of actions which [the executive] may be expected to take to fulfil the executive role.”¹¹¹ To this end, Harris considers that each minister, department, Crown entity and other government agency should supply a list of necessary functions and the legal authorities required to carry out those functions.¹¹²

Secondly, the executive would have to design legislation that authorises these functions.¹¹³ Some authorisations can be narrow and specific while others will be broad, depending on what is appropriate in light of their nature and consequences.¹¹⁴ Harris accepts that broad authorisations

¹⁰⁶ See Section 11.8.

¹⁰⁷ Harris, above n. 22, at 308 – 313.

¹⁰⁸ *Ibid.*, at 288.

¹⁰⁹ *Ibid.*

¹¹⁰ At 309.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ At 310.

could undermine the objective of parliamentary pre-approval¹¹⁵ and recommends that “careful and responsible decisions”¹¹⁶ should be made as to which authorisations are broad.

The third step would be for the executive to compare the “catalogue of all the needed authority”¹¹⁷ against existing legislation. Harris suspects that “it will be found that most of [the] necessary authority is already provided by statute[,], [m]any of [which] will have replaced former prerogative authorities.”¹¹⁸

Fourthly, the executive would have to review the “remaining active prerogatives”¹¹⁹ (that is, the ones without statutory authorisation) and compare these against the list of anticipated authorities. This will reveal “unrealised”¹²⁰ needs and also superfluous prerogatives.

The fifth step would be for the executive to replace the remaining active prerogatives with legislation, amending the scope of authorisation and discarding superfluous prerogatives as appropriate.¹²¹ Parliament should abolish the prerogative as a source of authority once satisfied that there is statutory authority for all necessary executive action.¹²² Harris notes that the process “will be gradual and could well take a number of years”.¹²³

The first step of Harris’s proposal appears unnecessary. It is unclear why the executive should have to catalogue every necessary function and authorisation to ascertain which prerogative powers need statutory replacement. The prerogative is not the source of authorisation of every executive function. Legislation and residual freedom authorise many functions of the executive

¹¹⁵ At 309.

¹¹⁶ At 310.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ At 310 – 311.

¹²² At 311.

¹²³ Ibid.

and Harris does not propose to replace these sources of authorisation. Therefore, Harris's proposal should only require a cataloguing of the prerogative powers that statute will replace. This means that the first step of Harris's proposal can be omitted and replaced with an enquiry into the prerogative powers that currently exist. The remainder of Harris's proposal is appropriate.

The reader might question at this point whether a catalogue of every necessary function and authorisation would be needed if statute were to replace both the prerogative and residual freedom, as proposed later in this thesis. It is submitted that a catalogue would not be necessary even then because of the availability of the "reasonably incidental" doctrine. Section 10.4.5 explains this in detail.

A simplified version of Harris's proposal to replace the prerogative with statute requires the following three steps. First, the executive should obtain a report that identifies the existing prerogative powers at common law. An exhaustive list of prerogatives may be difficult to compile because it is uncertain which prerogatives survive.¹²⁴ That should not be an issue because it will only be necessary to identify and replace with statute those prerogatives that the executive has either used in the past or anticipates will be useful. The report should also identify the extent to which existing legislation provides for the existing prerogatives. As Harris notes, many prerogatives will already have a statutory source,¹²⁵ although the ambit of the statutory power might not be co-extensive with the ambit of the prerogative at common law.

¹²⁴ See Section 10.3.2.

¹²⁵ For example, s 16 of the Constitution Act 1986 contains the power of royal assent; s 18 of the Constitution Act 1986 sets out the Governor-General's powers of summoning, proroguing and dissolving Parliament; s 176 of the Criminal Procedure Act 2011 provides that the Attorney-General can direct proceedings to be stayed, which is also known as the prerogative of *nolle prosequi*: see *Rewa*, above n. 36, at [19]; pts 2, 3 6 and 9 of the Immigration Act 2009 "supersede[]" the executive's power to restrain foreign nationals from entering New Zealand and expel foreign national from New Zealand territory: Joseph, above n. 2, at 689 – 690; the State Sector Act 1986 "largely replaces" the Crown's prerogatives as an employer: Harris, above n. 22, at 300, fn 99.

Secondly, the executive will need to identify the prerogatives that remain necessary, their appropriate scope, and the extent to which additional legislation or amendments to existing legislation will be necessary to create a statutory basis and framework for these powers. This step is likely to require the appointment of a special panel comprising ministers, Members of Parliament and constitutional lawyers who will interact with entities such as the Law Commission and Legislation Design and Advisory Committee to develop specific proposals for legislation.

The legislative proposals should, in general, aim for greater clarity about the scope of these powers and the conditions of their exercise. However, as Harris notes, broad statutory authorisations may be appropriate in some instances because of the nature of the powers and the consequences of their exercise.¹²⁶ For example, Joseph considers that it would be improper to codify the situations in which the Governor-General can depart from ministerial advice because the decision should be informed by “the Governor-General’s interpretation of the political situation.”¹²⁷ The panel’s legislative proposals should therefore accommodate the flexibility of the original prerogative where appropriate. For instance, a statute could express the Governor-General’s ability to refuse royal assent as a statutory discretion (“the Governor-General may refuse royal assent when the Governor-General considers it necessary to do so in national or public interest”) and leave it to political forces to determine whether the Governor-General’s exercise of the discretion was appropriate. To this end, the panel should also identify appropriate limits on the jurisdiction to review the exercise of specific powers because of their political nature.

Finally, Parliament should commence a programme of statutory replacement of prerogatives based on the panel’s recommendations. The programme should have a finite time-frame, such as a five-year period. Parliament should conclude the programme of statutory replacement of the prerogative by abolishing the royal prerogative as a source of executive authority.

¹²⁶ Harris, above n. 22, at 109 – 110.

¹²⁷ Joseph, above n. 2, at 752.

A legislative basis for the executive's former prerogative powers would be an improvement from the status quo in two respects. It would mean that Parliament, not the Crown, will be the source of executive powers. This would make the legal position consonant with the modern political reality that the power to govern no longer emanates from the Sovereign. Further, extinguishing the prerogative would mean that litigants and courts do not have to waste resources pondering over whether a statute is the only source of executive authority or whether the prerogative supplements the statute. There would be one less source of analytic uncertainty.

However, the statutory replacement of the prerogative also has a potential disadvantage. Parliament is not infallible. It cannot always be trusted to replace the prerogative with statutes that are well-drafted, proportionate to the executive's functional needs and consistent with other constitutional principles.

The Australian cases, *Williams v The Commonwealth (No 1)*¹²⁸ and *(No 2)*,¹²⁹ illustrate the concern about parliamentary fallibility. In *Williams (No 1)*, the High Court of Australia held that the Commonwealth of Australia did not have the executive power to make an agreement to pay money for the provision of chaplaincy services in schools, or to make payments pursuant to such an agreement. At the time of the decision, the agreements had no statutory backing. Subsequently, the Commonwealth Parliament enacted legislation that sought retrospectively to authorise the agreement and payments and to validate other agreements and arrangements for the outlay of public money.¹³⁰ The legislation was controversial; commentators pointed out that the Constitution of the Commonwealth did not appear to grant the Commonwealth Parliament the power to enact a statute for a purpose such as funding chaplaincy services at schools and that the "constitutional" means of such programmes would have been through making grants to

¹²⁸ *Williams (No 1)*, above n. 40.

¹²⁹ *Williams v The Commonwealth (No 2)* [2014] HCA 23.

¹³⁰ Financial Framework Legislation Amendment Act (No 3) 2012 (Cth).

state governments.¹³¹ In *Williams (No 2)*, the High Court upheld the challenge to the legislation. It found that the legislation was outside the scope of the Commonwealth Parliament's legislative authority.¹³² The agreements and payments in respect of the chaplaincy programmes remained invalid. The episode demonstrates "parliament's apparent failure to engage critically with the question of the constitutionality"¹³³ of the statute that was intended to empower the executive.

Parliamentary fallibility has especially sobering implications in New Zealand. Unlike the Australian Commonwealth, New Zealand does not have a codified constitution to limit Parliament's lawmaking powers or to authorise the judiciary to invalidate statutes that breach constitutional principles. It is correspondingly more difficult in New Zealand to safeguard against the risk of legislative over-empowerment of the executive.

It is submitted, however, that the concern about parliamentary fallibility should not overshadow the afore-mentioned advantages of replacing the prerogative with statute. The proposed programme of statutory replacement is unlike the situation in *Williams* because it involves long-term forward planning and input from a specialist panel and other entities with legal expertise; it is not an immediate and piecemeal response to an unfavourable court ruling. The proposed programme is therefore more likely to result in statutes that are well-drafted, proportionate to the executive's functional needs and consistent with other constitutional principles.

10.4. Residual freedom

¹³¹ Glenn Ryall "*Williams v Commonwealth* – a turning point for parliamentary accountability and federalism in Australia?" (Papers on Parliament No. 60, March 2014); Anne Twomey "Parliament's abject surrender to the executive" *Constitutional Critique* (27 June 2012) <<http://blogs.usyd.edu.au>>.

¹³² *Williams (No 2)*, above n. 129.

¹³³ Patrick Hodder "The *Williams* decisions and the implications for the Senate and its Scrutiny Committees" (Papers on Parliament No. 64, 2016).

It will be recalled that the thesis adopted the Blackstonian definition of the prerogative, which maintains a distinction between the prerogative and the Crown's residual freedom.¹³⁴ For clarity, the ensuing discussion continues to use the Blackstonian definition.

The Crown has a residual freedom to act without positive authorisation under a statute or a prerogative as long as the action is not contrary to the law.¹³⁵ This is because the Crown can do "anything which could be done by a natural person".¹³⁶ A natural person "may do anything...which the law does not prohibit."¹³⁷

Commentators use various terms to refer to the Crown's residual freedom. These include "the third source", "capacities", "de facto powers", "common law discretionary powers", "common law personified powers", "secondary prerogative powers", "pretended prerogatives" and "non-statutory powers".¹³⁸ However, residual freedom is not a "power" in the same sense that statutory empowerment or the royal prerogative are powers. That is because the Crown's residual freedom does not authorise it to override individual legal rights, whereas an exercise of a statutory or a prerogative power can override individual rights.¹³⁹

The value of residual freedom is that it allows the executive to tend to the business of government without needing to find authorisation under statute or prerogative for every specific action. Thus, a government department may enter into a contract or make an *ex gratia* payment even though there is no specific authorisation for these actions.¹⁴⁰ Residual freedom allows the

¹³⁴ See Section 10.3.1.

¹³⁵ Elliott, above n. 1, at 147.

¹³⁶ *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 at [44], *per* Carnwath LJ.

¹³⁷ *R v Somerset County Council, ex parte Fewings* [1996] 1 All ER 513 at 524, *per* Laws J.

¹³⁸ Harris (2007), above n. 1, at 225 – 226.

¹³⁹ At 226.

¹⁴⁰ At 226 – 227; Joseph, above n. 2, at 652.

government “to respond quickly, flexibly and relatively unhindered with the action it considers appropriate to meet, sometimes unexpected societal needs.”¹⁴¹

The theoretical explanation for residual freedom is that the Crown as a corporation enjoys the same rights and freedoms as a natural person.¹⁴² Private corporations also enjoy the freedoms of natural persons. However, statutory bodies do not because they are creatures of statute.¹⁴³ The Crown is an exception because it is not a statutory creation and is seen to have a personal capacity as a result of sharing the legal personality of the Sovereign, who is a natural person.¹⁴⁴

However, residual freedom poses a number of issues that undermine its appropriateness as a source of executive empowerment. The first issue is that the justification for residual freedom is based on an untenable analogy between private bodies and the Crown. Secondly, case law demonstrates that the executive’s exercise of freedom can lead to significant restrictions on individuals’ freedoms without a legal basis for such restriction. Thirdly, some cases show a risk that the executive can use residual freedom to supplement the scope of a statutory power, thereby exceeding Parliament’s intent. Fourthly, residual freedom contradicts the general principle that public bodies are reliant on positive authorisation for their powers. These arguments create a strong case for replacing residual freedom as a source of executive empowerment with statutory authorisation. This, in turn, removes the need to rely on the concept of the Crown for any form of executive empowerment.

10.4.1. Untenable theoretical basis

¹⁴¹ Harris (2007), above n. 1, at 237.

¹⁴² *Shrewsbury*, above n. 136, at [44].

¹⁴³ *Fewings*, above n. 137, at 524.

¹⁴⁴ Joseph, above n. 2, at 657.

The theoretical basis for the Crown's residual freedom is that the Crown as a corporation enjoys the capacities of a natural person or a private corporation. In *R v Secretary of State for Health, ex p C*,¹⁴⁵ Hale LJ accepted that:

[a]t common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual.

Similarly, Richards LJ stated in *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government*:¹⁴⁶

[The] ordinary business of government...depends heavily on the 'third source' of powers, ie powers that have not been conferred by statute and are not prerogative powers in the narrow sense but are the normal powers (or capacities and freedoms) of a corporation with legal personality.

The above justification overlooks the fact that the Crown is not really a private entity but a public body. Joseph¹⁴⁷ and Cohn¹⁴⁸ have challenged the soundness of the analogy between the Crown and a private entity. Joseph contends that the analogy "attributes to the Crown individual human personality which it manifestly lacks."¹⁴⁹ He submits that it is unjustifiable to use the common law conception of the Crown as a corporation sole to imbue the Crown with a private corporation's freedom. The historical purpose of the corporation sole analogy was "to promote a perpetual and hereditary Crown, not create unchecked capacity for executive action outside the law."¹⁵⁰

¹⁴⁵ *R v Secretary of State for Health, ex p C* [2000] 1 FCR 471.

¹⁴⁶ *Shrewsbury*, above n. 136, at [73], *per* Richards LJ; see also Greville Ram, First Parliamentary Counsel "Memorandum" (2 November 1945), which commentators say was misinterpreted to become the basis of the "Ram doctrine", and the discussion of it as the origin of the third source.

¹⁴⁷ Joseph, above n. 2, at 658; see also Philip Joseph "Positive empowerment theory" in *Scrutinising the actions of government* (New Zealand Law Society, Wellington, 2014) 11.

¹⁴⁸ Margit Cohn "Medieval chains, invisible inks: on non-statutory powers of the executive" (2005) 25(1) OJLS 97.

¹⁴⁹ Joseph, above n. 2, at 657.

¹⁵⁰ *Ibid.*

Cohn also questions the appropriateness of the analogy by highlighting the difference between public power and private freedom. She writes:¹⁵¹

Personification/corporatization, which relies on an analogy between the state and other juristic persons' freedom to act as long as they are not prohibited by law, is gaining force but it misdirects attention from the particularities of public power. Analogies to legal bodies (whatever their nature may be) ... deflect attention from the distinct nature of public power, which justifies, even in today's "rolled back" state, more than an emulation of private law constructs.

The essence of both Joseph and Cohn's criticism is that treating the Crown as a private entity fundamentally distorts the nature of executive power. Governments enjoy vast coercive powers and have a wide range of enforcement mechanisms at their disposal, which are unavailable to private entities. A private entity is also free to pursue its self-interest whereas governments are expected to act in the public interest. Joseph notes that "[p]rivate persons may act out of malice, revenge or caprice and incur no legal liability but the Crown must act lawfully, reasonably and in good faith."¹⁵² Further, the principle that government should be "according to law" is fundamental to the rule of law;¹⁵³ the notion that the executive enjoys "freedom" is "inimical" to this principle.¹⁵⁴ These differences make the analogy between the Crown and private corporations inadequate to justify the government's claim to residual freedom.

A now-discredited explanation of residual freedom is the so-called "Ram doctrine".¹⁵⁵ The alleged source of this doctrine is a 1945 memorandum by Sir Greville Ram, First Parliamentary Counsel, to the British Government.¹⁵⁶ Sir Greville advised that "express statutory provision is not

¹⁵¹ Cohn, above n. 148, at 121.

¹⁵² Joseph, above n. 2, at 655.

¹⁵³ At 658.

¹⁵⁴ At 657.

¹⁵⁵ Elliott, above n. 1, at 148; Andrew Blick *The Codes of the Constitution* (Hart Publishing, Oxford, 2016) at 37.

¹⁵⁶ Greville Ram, First Parliamentary Counsel "Memorandum" (2 November 1945).

necessary to enable a Minister to exercise functions”¹⁵⁷ because ministers can “exercise any powers that the Crown has, except so far as he is precluded from doing so by statute.”¹⁵⁸ The Government interpreted Ram’s memorandum as meaning that “ministers can do anything a natural person can do, unless limited by legislation.”¹⁵⁹ In 2013, the House of Lords Constitution Committee recognised that the Government had misinterpreted Ram’s memorandum and that the so-called “Ram doctrine” is therefore not a justification of the Crown’s residual freedom. Commentators agree with the Committee’s finding.¹⁶⁰

Harris has suggested that the theoretical inadequacy of residual freedom is irrelevant if residual freedom serves a pragmatic need for the modern government. He writes: ¹⁶¹

[The] attempt at theoretical justification is not important. The justification rather should be found in the pragmatic value of the government having third-source authority.

It is submitted that pragmatic value should not mask a lack of theoretical basis. Chapter 2 recorded that one of the avowed purposes of the thesis is to promote rationality in constitutional arrangements.¹⁶² Questioning why the executive has residual freedom is the first step to assessing whether the functional needs of the executive match the powers and freedoms that it enjoys. The preceding analysis shows that there needs to be a better explanation for the executive’s ability to act in the absence of positive legal empowerment than an assumption that it has the same freedoms as a natural person or private corporation.

10.4.2. Limiting effect on individual freedom

¹⁵⁷ Quoted in Blick, above n. 155, at 36.

¹⁵⁸ Ibid.

¹⁵⁹ House of Lords Constitution Committee *The pre-emption of Parliament* (HL 165, 2012 – 2013) at [55].

¹⁶⁰ Elliott, above n. 1, at 148; Blick, above n. 155, at 35 – 37.

¹⁶¹ Bruce Harris “The third source of authority for government action” in *Scrutinising the actions of government* (New Zealand Law Society, Wellington, 2014) 1 at 9.

¹⁶² See Section 2.1.

Proponents of residual freedom point out that there are a number of limits to its exercise that make it difficult for the government to use these freedoms to others' disadvantage. First, residual freedom only legitimises an action when there is no law to the contrary. The executive cannot override individual rights in the absence of legal authorisation.¹⁶³ This means that residual freedom cannot override anyone's legal right.¹⁶⁴ Secondly, the exercise of residual freedom is judicially reviewable.¹⁶⁵ This minimises the risk of harm to others from the exercise of residual freedom.

These arguments overlook that the executive's actions may nonetheless significantly limit others' freedoms without a lawful basis for imposing the limit. Such a limit "inverts the principle of legality",¹⁶⁶ which holds that the law should maximise individual liberty insofar as this is compatible with others' rights.¹⁶⁷

There are several examples where the executive's use of residual freedom fettering individual freedoms. In *Malone v Metropolitan Police Commissioner*,¹⁶⁸ the Court of Chancery Division upheld the Post Office's freedom to tap phones at the instruction of the Police because there was no law prohibiting the tapping of telephones. Counsel's argument that the tapping of telephones was "an interference with the liberty of the individual"¹⁶⁹ failed to move the Judge. In *R v Secretary of State for Health, ex parte C*,¹⁷⁰ the Court of Appeal held that the Ministry of Health was free to maintain a consultancy index of people whose suitability to work with children

¹⁶³ *Entick v Carrington* (1765) 19 St Tr 1030.

¹⁶⁴ *Ngan v R* [2007] NZSC 105 at [97]; Elliott, above n. 1, at 149; Nick Mereu "Hyperlexis and the sources of government authority" (Postgraduate research paper, Victoria University of Wellington, 2015) at 18.

¹⁶⁵ *Minister for Canterbury Earthquake Recovery v Fowler Developments Limited* [2013] NZCA 588 at [81]; *Ngan*, above n. 157, at [98], per McGrath J. Note that *Fowler* was overruled by the Supreme Court on appeal in *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, but not on the point of the availability of review for the exercise of residual freedom.

¹⁶⁶ Cohn, above n. 148, at 99.

¹⁶⁷ *Legislation Guidelines: 2018 edition* (March 2018, Legislation Design and Advisory Committee) <www.ldac.org.nz> Ch 4 at 4.3.

¹⁶⁸ *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch D).

¹⁶⁹ At 367.

¹⁷⁰ *C*, above n. 145.

was questionable, given that the list itself was not unlawful and “private citizens are free to maintain services such as this.”¹⁷¹ The reputational and livelihood interests of those named in the list did not outweigh the government’s freedom to make such a list. The New Zealand Court of Appeal upheld (in a decision eventually overturned by the Supreme Court)¹⁷² the Crown’s freedom to disseminate information that certain land was no longer suitable for residential occupation, despite such a declaration effectively depriving residents of their freedom to continue to live on such land because of the implications for Council services and insurance availability. It was enough that the dissemination of information did not interfere with the residents’ legal rights.¹⁷³ These examples demonstrate that residual freedom can materially disadvantage individual interests and freedoms without technically breaching a right.

There have been sporadic and unsuccessful judicial and academic attempts at limiting the ambit of residual freedom so that it cannot impinge upon individual freedoms. In *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government*, Carnwath LJ proposed that residual freedom should only authorise actions “for the public benefit and for identifiably ‘governmental’ purposes within limits set by the law”.¹⁷⁴ Plainly, there were interpretive issues surrounding the terms “public benefit” and “‘governmental’ purposes”, and Richards and Waller LJ disagreed with his Honour’s proposal in their separate judgments.¹⁷⁵ Lord Sumption suggested in *R (New College London Ltd) v Secretary of State for the Home Department* that residual freedom is only appropriate to justify “purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.”¹⁷⁶ This suggestion has also remained largely unendorsed;¹⁷⁷ in any case it is unclear that

¹⁷¹ At 405 – 406.

¹⁷² *Fowler*, above n. 165.

¹⁷³ At [108] and [127]; this case was overturned by the Supreme Court in *Quake Outcasts*, above n. 165, but on a separate point.

¹⁷⁴ *Shrewsbury*, above n. 136, at [48].

¹⁷⁵ At [72], *per* Richard LJ; at [80], *per* Waller LJ.

¹⁷⁶ *R (New College London Ltd) v Secretary of State for the Home Department* [2013] UKSC 51 at [28].

¹⁷⁷ See comment by Court of Appeal in *Fowler*, above n. 165, at [84]; Harris (2014), above n. 1, at 79. Note, however, that Joseph endorses Lord Sumption’s approach at Joseph, above n. 2, at 655.

such a limit would be adequate to protect individual interests, as “managerial acts” such as the firing of staff could undoubtedly impinge upon employees’ freedom.

10.4.3. A supplement to statutory powers?

A further concern about residual freedom is that it can supplement statutory provisions and enable the executive to overstep the boundaries set by Parliament. In theory, this possibility is precluded by the legal position that where legislation has “covers the field”,¹⁷⁸ residual freedom is displaced. In practice, a level of ambiguity is inevitable about where statutory authorisation ends and residual freedom begins.

A number of decisions in the United Kingdom and New Zealand illustrate this issue. In *Shrewsbury*,¹⁷⁹ the Secretary of State sought submissions on a White Paper setting out this a proposal to replace two-tier local councils with unitary councils. The Local Government Act 1992 had a legislative machinery for proposing changes to local government structures but the Secretary of State did not rely on that mechanism. Instead, she chose to promote new legislation that would confer the powers to implement the proposals. The applicant councils sought a ruling that the Secretary of State had acted illegally by embarking on the consultation outside the mechanism provided in the existing legislation.¹⁸⁰

The Court of Appeal unanimously dismissed the application on the basis that the Crown had the residual freedom to promote new policy without express legislative authorisation. However, the Judges disagreed on whether the consultation process had been inconsistent with the existing legislative framework. Richards LJ found that there was no inconsistency,¹⁸¹ whereas Carnwath and Waller LJ considered that the Secretary of State had to an extent acted inconsistently with

¹⁷⁸ *Quake Outcasts*, above n. 165, at [109] and [112]; see also *Shrewsbury*, above n. 136, at [54].

¹⁷⁹ *Shrewsbury*, above n. 136.

¹⁸⁰ At [4] – [17].

¹⁸¹ At [75].

the existing legislative machinery.¹⁸² Carnwath LJ stated that he had “concerns...about the extent to which a wholly non-statutory procedure has been used to prepare the way for decisions, in an area which is accepted as the province of the legislature.”¹⁸³ Nonetheless, both Carnwath and Waller LJ held that consultation was not illegal in this case because it did not of itself have any legal effect or affect legal rights.¹⁸⁴ Carnwath LJ also considered that the new legislation retrospectively authorised the consultation.¹⁸⁵

The concern with Carnwath and Waller LJ’s approach is that it accorded the executive more options than the one that Parliament had prescribed for consultation. Residual freedom supplied the ability that Parliament had withheld from the Secretary of State.

A similar concern emerges in the New Zealand Court of Appeal’s decision in *Minister for Canterbury Earthquake Recovery Authority v Fowler Developments*.¹⁸⁶ The Supreme Court subsequently overturned the decision but the Court of Appeal’s reasoning demonstrates the potential for confusion in the future.¹⁸⁷

An issue in *Quake Outcasts* was whether ministers had the authority to announce the “red zone” under the Canterbury Earthquake Recovery Act 2011 in the aftermath of the 2010 and 2011 Canterbury earthquakes.¹⁸⁸ Section 30 of the Act empowered the Chief Executive to “disseminate information and advice on matters relating to work and activities under this Act”. Residents affected by the declaration of the red zone argued that s 30 did not permit ministers to disseminate information as it referred to the Chief Executive. The Court agreed that s 30

¹⁸² At [70], *per* Carnwath LJ; at [82], *per* Wallers LJ.

¹⁸³ At [70].

¹⁸⁴ At [58] – [59], *per* Carnwath LJ; at [80], *per* Wallers LJ.

¹⁸⁵ At [70], *per* Carnwarth LJ.

¹⁸⁶ *Fowler*, above n. 165.

¹⁸⁷ *Quake Outcasts*, above n. 165.

¹⁸⁸ *Fowler*, above n. 165, at [11].

empowered the Chief Executive to disseminate information but considered that it did not stop ministers from communicating with the public regarding the red zone.¹⁸⁹ The Court found:¹⁹⁰

There is nothing in s 30 (or elsewhere in the CER Act) that indicates any intention to restrict Ministers' abilities to communicate with the public on matters relating to their portfolios or, indeed, any other matter of interest to the public. Given that this sort of communication with the public is an important part of the everyday operation of Government, it could be expected that if Parliament intended to restrict it, it would do so in clear language. In the absence of any clear signal to that effect from the statutory wording, we conclude that no such restriction was intended or imposed.

The essence of the Court's reasoning was that express statutory language granting the power to disseminate certain information to the Chief Executive Officer did not take away the freedom of other members of the executive to disseminate that information.

The majority of the Supreme Court overturned the Court of Appeal's decision in *Quake Outcasts v Minister for Canterbury Earthquake Recovery*.¹⁹¹ The Court found that the Act "covers the field"¹⁹² and accordingly, there was no "need to make any comment on the existence or the extent of any residual Crown powers in other circumstances."¹⁹³ The fact that Parliament had expressed the Act's purposes "comprehensively"¹⁹⁴ indicated that Parliament had intended the Act to be "the only vehicle"¹⁹⁵ for major earthquake recovery measures. It could not have been Parliament's intention "that the safeguards in the Act could be circumvented by acting outside of the Act."¹⁹⁶ The executive should have complied with s 30 to disseminate information about the red zone.

¹⁸⁹ At [125] – [126].

¹⁹⁰ At [126].

¹⁹¹ *Quake Outcasts*, above n. 165.

¹⁹² At [112].

¹⁹³ *Ibid.*

¹⁹⁴ At [115].

¹⁹⁵ *Ibid.*

¹⁹⁶ At [117]; see also at [146].

The *Quake Outcasts* litigation demonstrates that residual freedom obscures the legitimate scope of executive authority. The rule that there is no scope for residual freedom where a statute “covers the field” does not protect against this concern. This is because whether or not a statute “covers the field” is a question of statutory interpretation and is inherently uncertain. The Court of Appeal considered that the Canterbury Earthquake Recovery Act left scope for residual freedom; the Supreme Court considered that it did not. Neither the executive nor the public can be expected to ascertain the correct scope of authority when there is disagreement at the highest levels of the judiciary as to whether or not a statute covers the field. It is submitted that the scope of executive authority would be significantly clearer if residual freedom could not supplement the scope of statutory provisions.

10.4.4. Challenges as to existence

Some judges and academics have questioned whether residual freedom should at all be recognised as a source of authorisation for executive action. The argument against recognising the Crown’s residual freedom arises from the view that public bodies are reliant on positive authorisation for their powers. In *R v Somerset County Council, ex parte Fewings*, Laws LJ asserted that “[a] public body has no heritage of legal rights which it enjoys for its own sake”¹⁹⁷ and that its “public responsibility...defines its purpose and justifies its existence.”¹⁹⁸

Fewings concerned a local authority, but the underpinning principle has found traction in the context of the Crown.¹⁹⁹ In *Shrewsbury*, Carnwath LJ reluctantly acknowledged residual freedom but sought to keep any such power “strictly confined”²⁰⁰ by imposing the requirement that the

¹⁹⁷ *Fewings*, above n. 137, at 523.

¹⁹⁸ *Ibid.*

¹⁹⁹ See Joseph, above n. 2, at 655

²⁰⁰ *Shrewsbury*, above n. 136, at [47].

Crown could only exercise such powers “for the public benefit.”²⁰¹ In *New College London*, Lord Carnwath was more sceptical about the existence of residual freedom.²⁰² His Lordship stated:²⁰³

I cannot accept [counsel’s] submission...that there is some alternative, unidentified source of such powers, derived neither from the prerogative nor from any specific provision in the Act, but from the general responsibilities of the Secretary of State in this field. No authority was cited for that proposition and to my knowledge none exists. Mr Swift did not seek to rely on a possible “third source” of powers, by reference to the “controversial” line of cases mentioned by Lord Sumption (para 28). In my view he was wise not to do so (for the reasons given in my judgment for the majority in the *Shrewsbury* case [2008] 3 All ER 548, 562 – 4).

In *Hamed v R*, Elias CJ relied on *Fewings* in a bid to extinguish residual freedom as a source of executive authorisation in New Zealand.²⁰⁴ Her Honour said:²⁰⁵

Public officials do not have freedom to act in any way they choose unless prohibited by law, as individual citizens do. The common law position in New Zealand and in the United Kingdom is that, except in matters within the prerogative or as is purely incidental to the exercise of statutory or prerogative powers, the executive and its servants must point to lawful authority for all actions undertaken.

Elias CJ’s comments do not reflect the legal position in New Zealand. Other courts have recognised residual freedom in a number of cases both before and since *Hamed*.²⁰⁶ In *Lorigan v R*, the Court of Appeal described Elias CJ’s views as “those of a minority.”²⁰⁷ However, Elias CJ’s

²⁰¹ At [48].

²⁰² *New College London*, above n. 176, at [34].

²⁰³ Ibid.

²⁰⁴ *Hamed v R* [2011] NZSC 101 at [26].

²⁰⁵ At [24].

²⁰⁶ *R v Fraser* [1997] 2 NZLR 442 (CA); *R v Gardiner* (1997) 15 CRNZ 131 (CA); *Ngan*, above n. 164, at [93] – [101], per McGrath J; *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 at [110], per McGrath J; *Hamed*, above n. 204, at [217], per Tipping J; *Lorigan v R* [2012] NZCA 264 at [37].

²⁰⁷ *Lorigan*, above n. 206, at [37]; the Supreme Court dismissed an application for leave to appeal against the Court of Appeal’s decision in *Lorigan v R* [2012] NZSC 67.

comments serve as valuable dicta from the apex of the New Zealand judiciary that positive empowerment should be necessary to authorise the executive and that the law should dispense with residual freedom in New Zealand.

10.4.5. Reforms

Harris, Cohn and Joseph lead the academic discussion on legal reforms that would address the issues with residual freedom discussed above. Harris suggests setting conventional expectations on the exercise of residual freedom, backed up by a system of parliamentary scrutiny of its exercise.²⁰⁸ Cohn proposes placing significant limits on the executive's reliance on residual freedom.²⁰⁹ Joseph recommends dispensing with residual freedom altogether and replacing it with positive empowerment.²¹⁰ The three proposals are evaluated below. It is submitted that Joseph's proposal emerges as conceptually the tidiest and, in conjunction with the proposal to abolish the prerogative,²¹¹ removes entirely the need to rely on the concept of the Crown for the sources of executive power.

10.4.5.1. Harris's conventional expectation model

Harris suggests that there should be "a new and clearer set of expectations"²¹² that executive action should normally be authorised in advance by statute. Residual freedom should only remain to allow the government authority to do the unforeseen.²¹³ The expectation would be that residual freedom should be used as "a last resort"²¹⁴ and a "necessity".²¹⁵

²⁰⁸ Harris (2007), above n. 1, at 246 – 249.

²⁰⁹ Cohn, above n. 148, at 120.

²¹⁰ Joseph, above n. 2, at 652 – 659.

²¹¹ See Section 10.3.4.

²¹² Harris (2007), above n. 1, at 246.

²¹³ At 247.

²¹⁴ At 247.

²¹⁵ At 249.

The conventional expectation model proposes that the executive should record any use of residual freedom and report it to Parliament.²¹⁶ Parliament can refer the matter to an appropriate select committee and obtain a report on whether the exercise was appropriate. Parliament should hold the executive to account if the exercise was inappropriate and might even take legislative action to “counter” the executive’s action.²¹⁷ Where the executive had to use its residual freedom to respond to an unforeseen situation, Parliament should follow up with legislation that authorises similar action for the future. Parliament should also retrospectively accord a statutory basis to the action already undertaken on the basis of residual freedom.²¹⁸

The model further proposes that courts should no longer use the “current three-source”²¹⁹ approach in judicial review when asking whether there is authority for an executive action. Instead, judicial review should commence with an inquiry into whether there is positive authority for the action. Such an approach “would be consistent with the expectation and convention that authority should normally be provided in positive law in advance of all [executive] action.”²²⁰ However, actions based on residual freedom will remain valid provided that they are not inconsistent with positive law.²²¹

The strengths of the conventional expectation model are that it encourages greater scrutiny of the use of residual freedom and enables a gradual shift towards statutory authorisation. It also retains the possibility for the executive to act despite the absence of statutory authorisation where it may be necessary to do so.

However, the conventional expectation model is susceptible to several criticisms. First, one struggles to perceive any substantive difference between what Harris describes as the “current

²¹⁶ At 247.

²¹⁷ Ibid.

²¹⁸ At 247 – 248.

²¹⁹ At 248.

²²⁰ Ibid.

²²¹ Ibid.

three-source”²²² approach to judicial review and his proposed approach. It is already the legal position that a statute that “covers the field” eliminates the scope for the executive to use its residual freedom to act in a manner unauthorised by the statute.²²³ Statutory interpretation is therefore already the starting point for analysing the scope of executive authorisation. Harris’s proposal that judicial review should first enquire whether there is positive authorisation seems to be the same approach.

A second criticism is that a parliamentary mechanism for monitoring would involve significant additional workload that may make the system ineffective. Requiring every exercise of residual freedom to be reported to Parliament would entail additional pre-action or post-action procedures for government bodies, where they have to categorise the source of the action and record the action for reporting. The workload for the parliamentary committee reviewing these reports may be considerable, depending on the number of reported instances. It is also probable that Parliament would treat the majority of recommended legislation as being of lower priority because of the academic nature of their concern (namely, the reclassification of the source of executive authority). This would mean that there could be significant delays before statutory authorisation eventuates, if at all it eventuates.

A further risk is that a parliamentary mechanism of monitoring would be politicised. It is doubtful that Parliament would counter an inappropriate exercise of residual freedom with legislative action: Harris himself acknowledges that “the reality of executive domination of the legislature may limit the likelihood of such a parliamentary reaction.”²²⁴ This is likely to be the case even where there is a minority government under the Mixed-Member Proportionate system; a coalition partner may be reluctant to jeopardise its position in government by criticising the use

²²² Ibid.

²²³ See *Quake Outcasts*, above n. 165, at [109] – [117].

²²⁴ Harris (2007), above n. 1, at 247.

of residual freedom. The likelihood of reformative legislation is therefore contingent on party politics.

Finally, the conventional expectation model fails to alleviate the existing issues with residual freedom. It does not prevent the executive from impinging on others' freedoms in the absence of statute or prerogative. It does not address the possibility of residual freedom supplementing the scope of statutes. Further, it provides no theoretical justification for the executive's claim to an individual's freedom. For these reasons, it is submitted that the convenient expectation model is not a satisfactory solution.

10.4.5.2. Cohn's limited model for residual freedom

Cohn considers that the concept of residual freedom "ignores the particularities of state power"²²⁵ and has suggested placing three limitations on its scope to minimise its problematic implications.²²⁶ The first is that residual freedom should not authorise actions that directly affect human rights and freedoms. Secondly, the existence of statute in an area of law should be seen as invalidating any executive action that is based on residual freedom instead of the statute. Thirdly, issues that have long-lasting bearing on society, including impact on human rights should be treated as requiring statute rather than residual freedom. Cohn describes her proposal as a "tentative sketch"²²⁷ only and does not explore what these restrictions would mean in practice. It is appropriate to consider these further and examine whether they would adequately resolve the issues discussed above.

The proposal that residual freedom should not impinge on others' freedoms is well-intentioned but might be difficult to implement because of the difficulty in defining "freedom". One possibility would be to construe "freedom" as the "fundamental freedoms"²²⁸ protected under

²²⁵ Cohn, above n. 148, at 99.

²²⁶ At 120.

²²⁷ Ibid.

²²⁸ New Zealand Bill of Rights Act 1990, long title.

the New Zealand Bill of Rights Act 1990. These are the freedoms of thought, conscience and religion,²²⁹ expression,²³⁰ peaceful assembly,²³¹ association²³² and movement²³³ and the freedom from discrimination.²³⁴ However, such an interpretation would arguably be overly restrictive. For example, an executive action that affects one's reputation or livelihood (such as the maintenance of a consultancy index of people unsuitable to work with children)²³⁵ or impairs one's ability to live in a certain area (such as by declaring an area to be "red zone")²³⁶ would not be breaches of the fundamental freedoms.

Another option would be to interpret "freedom" more generously as the liberty to do "anything...which the law does not prohibit."²³⁷ That is, the executive would need positive authorisation to take any action that impinges on a person's liberty to do anything not prohibited by the law. Harris suggests, by way of illustrating Cohn's proposal, that a government scheme to provide free veterinary services to farmers would not be permissible under Cohn's proposal because it would interfere with the freedom of private veterinarians to provide their services to farmers.²³⁸

However, a generous interpretation of individual freedom is likely to exacerbate uncertainty about what the executive can legitimately do without positive authorisation. Any action that inconveniences or adversely affects an individual is arguably an impingement on his or her freedom. For example, a government contractor whose contract is not renewed and whose business goes into liquidation might claim that the decision not to renew his contract has

²²⁹ At s 13.

²³⁰ At s 14.

²³¹ At s 16.

²³² At s 17.

²³³ At s 18.

²³⁴ At s 19.

²³⁵ *C*, above n. 145.

²³⁶ *Fowler*, above n. 165; *Quake Outcasts*, above n. 165.

²³⁷ *Fewings*, above n. 137, at 524, *per* Laws J.

²³⁸ Harris (2007), above n. 1, at 244.

adversely affected his freedom to earn a living. A broad definition of “freedom” would be likely to expose a wide range of exercises of residual freedom to judicial review. Limiting the executive’s residual freedom with reference to individual freedom is therefore likely to be unfeasible.

Cohn’s second proposal is that there should be a “rule of residuality”²³⁹ that would require the existence of statute to exclude non-statutory action in the same subject matter except in exceptional circumstances. At first glance, this appears to be a reiteration of the current legal position: as discussed above, a statute that “covers the field” leaves no scope for residual freedom to supplement the statutory provisions.²⁴⁰

A more meaningful interpretation of Cohn’s second proposal might be that the rule of residuality is an assumption that any statute on a subject matter is intended to “cover the field” so that courts do not attempt to validate actions that do not rely on the statute on the basis of residual freedom. Thus, a court would decline to hold that the Secretary of State can undergo consultation following a procedure not provided for within the existing local government legislation because the existing legislation removes any residual freedom in the matter;²⁴¹ similarly, a court would not waste time inquiring whether the Canterbury Earthquake Recovery Act was intended to “cover the field” – it would assume that it does cover the field.²⁴² If this is indeed Cohn’s intended proposal, the rule of residuality appears to solve the problem of the executive circumventing statutory limits using residual freedom.

Cohn retains a proviso that “exceptional circumstances”²⁴³ may displace the rule of residuality. It is unclear what would count as “exceptional circumstances”; Cohn does not elaborate, save to say that the exceptions “should reinforce the general rule”.²⁴⁴ One suspects that this proviso is

²³⁹ Cohn, above n. 148, at 120.

²⁴⁰ *Quake Outcasts*, above n. 165, at [112].

²⁴¹ Cf *Shrewsbury*, above n. 136, discussed in Section 10.4.3.

²⁴² Cf *Quake Outcasts*, above n. 165, discussed in Section 10.4.3.

²⁴³ Cohn, above n. 148, at 120.

²⁴⁴ *Ibid.*

best removed, as admitting exceptions would keep the door ajar for existing confusions to creep in also.

Cohn's third proposal is to have a "loose pro-legislation rule":²⁴⁵

...[I]ssues that have long-lasting bearing on society, even if they do not bear directly on human rights, should generally be treated as requiring statute.

The aim of this third proposal appears to be to encourage legislative scrutiny of the scope of executive authority to act on issues of importance. It is submitted that the proposal is too vague to achieve this purpose. Cohn provides no guidance on who would monitor the rule – the courts or Parliament – and how. Harris correctly questions what is meant by "long-lasting bearing" and where Parliament or the courts would draw a line between these and issues that are of "short-lasting bearing".²⁴⁶ Surely there may also be issues of "short-lasting bearing" that are sufficiently significant to warrant legislative scrutiny?

Overall, Cohn's proposals for reform are inadequate to address the issues with residual freedom. While a rule of residuality may prevent residual freedom from supplementing statutes, the first and third proposals are impracticable.

10.4.5.3. Joseph's positive empowerment theory

Joseph considers residual freedom to be fundamentally inappropriate as a source of executive empowerment. His objection to residual freedom stems from the view shared by Laws J in *Fewings*²⁴⁷ and Elias CJ in *Hamed*:²⁴⁸ a public body has no authority to act except to the extent positively authorised by law to do so. Joseph argues that there is no conceptual foundation to

²⁴⁵ Ibid.

²⁴⁶ Harris (2007), above n. 1, at 246.

²⁴⁷ *Fewings*, above n. 137, at 525.

²⁴⁸ *Hamed*, above n. 204, at [24].

treating the Crown like a private individual when it is, in fact, a public body.²⁴⁹ He proposes that residual freedom should be discarded altogether as a source of executive authorisation. Instead, the executive may only act when positively empowered to do so by statute or by prerogative.

The requirement of positive authorisation may appear impracticable at first glance given that prerogative powers are confined to the ones presently recognised and it is not feasible for statutes to authorise the vast range of actions that the executive must undertake. However, Joseph considers that a “reasonably incidental” doctrine would adequately replace the Crown’s residual freedom. The reasonably incidental doctrine would allow the Crown to do “whatever is reasonably incidental to, or consequential upon, the achievement of its authorised purpose (or purposes).”²⁵⁰ The Crown would have to show that an action is “reasonably incidental” to an authorised purpose by establishing that it is reasonably necessary to achieve the purpose of the statute or to exercise the prerogative.²⁵¹

Joseph cites the Crown Entities Act 2004 as an example of how the reasonably incidental doctrine may operate in practice. Section 17 of the Act gives a statutory entity the ability to “do anything that a natural person of full age and capacity may do” but s 18 confines that ability only to actions “for the purpose of performing its functions.” The definition of “functions” under s 14(1)(c) includes “any functions that are incidental and related to, or consequential on” the more specific functions of that statutory entity. The formulation of this authorisation gives a statutory body the latitude to carry out actions incidental to its purpose but only to the extent it is reasonably necessary. Joseph suggests that a similar formulation should be adequate for the Crown to carry out all its functions effectively.

²⁴⁹ Joseph, above n. 2, at 657.

²⁵⁰ At 655.

²⁵¹ At 657.

Joseph's proposal assumes that both statute and the prerogative will remain sources of positive empowerment. This chapter earlier proposed a programme of statutory replacement of the prerogative over a finite period of time. The ensuing critique of Joseph's proposal assumes the existence of the prerogative but also considers the consequences of replacing the prerogative with a statute where relevant. It is submitted that statutory replacement of the prerogative enhances Joseph's proposal: it makes Parliament the source of all executive authority and renders the Crown entirely redundant to explaining executive power.

Joseph's proposal is patently more feasible than those proposed by Harris and Cohn. Parliament can, by a simple statute, abolish residual freedom and provide that statutory and prerogative powers should be construed as allowing executive entities to carry out any function that is incidental and related to or consequential upon that entity's authorised purposes. If statute were also to replace the prerogative, then statute would be the only source of positive empowerment and the executive's authority would be circumscribed by what is reasonably incidental to the statute's purposes.

A conceptual advantage of Joseph's proposal over residual freedom is that positive empowerment removes the need to rely on the theoretically untenable proposition that the Crown has the same freedom as a private individual.²⁵² Instead, the executive will only have the authority to do that which is "reasonably incidental" to the scope of positive legal empowerment. This aligns better with the principle of "government according to law"²⁵³

The removal of the Crown's residual freedom places the executive government on a more equal footing with other public bodies. It will be recalled that in *Fewings*, Laws LJ asserted that "[a] public body has no heritage of legal rights which it enjoys for its own sake"²⁵⁴ and that its "public

²⁵² See Section 10.4.1.

²⁵³ Joseph, above n. 2, at 658.

²⁵⁴ *Fewings*, above n. 137, at 523.

responsibility...defines its purpose and justifies its existence.”²⁵⁵ The requirement of positive empowerment means that the Crown will no longer have a freedom that public bodies do not have simply by virtue of being “the Crown”.

It is submitted that the thesis’s proposal to replace the prerogative with statute consolidates Joseph’s proposal in two ways. First, the removal of the prerogative as a source of empowerment achieves greater parity between the executive and other public bodies. Joseph’s proposal retains the executive’s ability to act on the basis of the prerogative, which is a source of power unique to the Crown. By contrast, the statutory replacement of the prerogative means that the executive, like any other public body, can only derive authority from legislative empowerment. Secondly, making statute the only source of executive empowerment achieves consistency with the ideal of democratic legitimation. To quote Harris, “modern democratic society should aspire to provision through Parliament of those legal authorities which the government needs in order to perform all the functions society wants and expects it to perform.”²⁵⁶

One concern about replacing residual freedom with positive empowerment is that it would remove the in-built safeguard in the exercise of residual freedom that it cannot infringe existing legal rights. The requirement of positive empowerment changes the status of the authorisation from “freedom” to statutory or prerogative power. Such powers can override individual rights. Harris cautions: “broad statutory authorisations may threaten legal rights of citizens which would have prevailed should the government action have been taken under the third source.”²⁵⁷

It is submitted that Harris’s caution overinflates the risk to individual rights. The reasonably incidental doctrine circumscribes the scope of positive empowerment more narrowly than residual freedom. The doctrine only authorise actions that are reasonably necessary to achieve

²⁵⁵ Ibid.

²⁵⁶ Harris, above n. 22, at 287.

²⁵⁷ Harris (2007), above n. 1, at 242.

the purpose of the statute or prerogative, not all actions that would otherwise have been justified under residual freedom.

Further, there are statutory and common law presumptions in respect of the effect on statutes on fundamental legal rights. Courts accept that only clear statutory language can displace fundamental rights.²⁵⁸ Section 6 of the New Zealand Bill of Rights Act 1990 requires courts to prefer an interpretation of a statute that is consistent with the rights and freedoms contained in the Bill of Rights Act, where such an interpretation is possible. It is likely that courts would rely on these interpretive presumptions to ensure that the reasonably incidental doctrine does not permit a statute to override a fundamental legal right unless the parliamentary intent is clearly to override such rights.

A second concern is that the need to find positive empowerment may inhibit the executive from acting promptly in unforeseen situations that require an urgent response. What would happen if an unprecedented situation or emergency arises where the necessary action is outside the authorised purpose of any existing positive empowerment?

It is submitted that there are two potential approaches to this concern. One is for the executive to respond to the situation without legal authority and for Parliament to enact retrospective legislation. Retrospective legislation is not typically an appropriate practice.²⁵⁹ However, the Legislation Design and Advisory Committee notes that retrospective legislation may be appropriate in some circumstances. These include situations where the legislation would “be entirely to the benefit of those affected”, “validate matters generally understood and intended to be lawful, but that are, in fact, unlawful as a result of a technical error”, and to “address a

²⁵⁸ John Burrows “The changing approach to the interpretation of statutes” (2002) 33 VUWLR 981 at 990, citing Lord Hoffman in *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 114 (HL) at 131.

²⁵⁹ *Legislation Guidelines: 2018 edition*, above n. 167, at Ch 12; see also Interpretation Act 1999, s 7.

matter that is essential to public safety”.²⁶⁰ An executive response in an unprecedented situation is likely to meet one or more of these criteria.

However, retrospective legislation is less preferable to appropriately drafted prospective empowerment. There is a risk that Parliament may choose not to legitimise an executive action, in which case the executive could face exposure to litigation.

The second option is for the executive to respond to the situation in reliance on the prerogative of keeping the peace or its statutory counterpart once statute replaces the prerogative. The New Zealand Court of Appeal recognised in *Goodall v Te Kooti* that the prerogative of keeping the public peace is “a leading duty”²⁶¹ and that “everyone has to sacrifice part of his individual rights and liberties for that object.”²⁶² It would be important for Parliament to ensure that a statute that replaces the peace prerogative has adequate safeguards to prevent the executive from using the statute to act in situations that are non-urgent and where specific positive empowerment is available. Courts can enforce these safeguards by quashing any executive action that relies on the statute in circumstances that do not reach the statutory threshold for “urgency” or where specific empowerment was available. The benefit of this approach would be to prospectively authorise executive responses to unforeseen and urgent situations while confining the scope of that authorisation to only those situations.

A final consideration is the extent to which extinguishing residual freedom would create gaps in authorisation for existing government functions. Two critical functions of government that rely on residual freedom are contract-making and policy-making. The ability to contract is arguably implicit in a number of existing statutes and it may be that no legislative change would be needed to authorise contract-making. For instance, s 127 of the Crown Entities Act 2004 sets out how

²⁶⁰ Ibid.

²⁶¹ *Goodall v Te Kooti* (1890) 9 NZLR 26 (CA) at 58.

²⁶² Ibid; see also Joseph, above n. 2, at 693 – 695.

statutory entities may contract with third parties. Section 4 of the Fair Trading Act 1986 mentions that the Act binds the Crown in so far as the Crown engages in trade. It is implicit in these statutes that the executive government can enter into contracts. Nonetheless, it is submitted that the best way to ensure continued authority for contract-making would be to include a provision in the statute that extinguishes residual freedom that it preserves in full the executive's ability to contract.

Finding authorisation for policy-making is conceptually more difficult. Policy-making often precedes legislation and therefore cannot be authorised as reasonably incidental to the statute that it engenders until after the fact. One option is to trace the empowerment for policy-making in the Letters Patent of 1983 or a statutory provision that incorporates it as part of the statutory replacement of prerogative instruments. Clause 7 of the Letters Patent constitutes the Executive Council for the purpose of "advi[sing] [the Sovereign] and [her] Governor-General in the Government of [her] Realm of New Zealand." It is possible to justify policy-making as reasonably incidental to the function of advising the Sovereign and the Governor-General. However, this would be a legal fiction because the Sovereign has ascended politics and the Governor-General does not decide policy. It is therefore preferable to enact a general statutory confirmation of the executive's ability to develop policies.

The above discussion establishes that there are several advantages to Joseph's proposal and no particular disadvantage flowing from it. It is considerably more feasible and conceptually tidier than Harris and Cohn's suggested reforms. Accordingly, it is submitted that residual freedom should be extinguished and replaced with the positive empowerment and reasonably incidental doctrine.

10.4. Conclusion

This chapter examined the problems posed by the Crown-derived sources of executive authority, namely the royal prerogative and residual freedom. It developed proposals for reform based on Harris's recommendation that statute should replace the prerogative and Joseph's proposal that

positive empowerment should be necessary for all executive action and that the reasonably incidental doctrine should replace the executive's residual freedom.

This conclusion records a further observation. Replacing the prerogative while retaining residual freedom, or vice versa, would be an incomplete reform. That is because such a reform would retain the Crown as a source of executive authority. The concept of the Crown no longer justifies executive empowerment. The shift from monarchical to parliamentary government means that Parliament, not the Crown, should be the source of executive power. A clean sweep of Crown-derived sources of executive authority is justified.

The chapter therefore submits that statute should replace both, the prerogative and residual freedom. The reasonably incidental doctrine makes it feasible to require positive statutory empowerment for all executive action.

Chapter 11: An alternative State theory

11.1. Overview

The preceding chapters have shown the shortcomings of the concept of the Crown. This chapter proposes replacing the Crown with a more effective theory of the State. It does not import a “ready-made” State theory from another jurisdiction. Instead, the chapter designs a State theory using familiar principles that can be implemented through legislative amendments.

It is proposed that instead of the Crown there will be an entity called the State. The Queen will remain the Head of State but the State will have a distinct legal personality and will act its own name. The Crown’s duties in respect of the Treaty of Waitangi shall vest in the State.

The State will represent all three branches of government and the public sector. This will necessitate two further reforms. First, the scope of central government liability must be circumscribed by statute to prevent the central government from being liable for the actions of the entire public sector. Secondly, existing statutory references to the Crown must be redrafted so that the different ambits of the Crown and the State do not result in unintended consequences. This is particularly so for immunities that attach to the Crown.

Four further changes are proposed to simplify the rules affecting the State’s liability and participation in legal proceedings. First, the State will be directly (as opposed to vicariously) liable for unlawful actions regardless of whether the breach occurs in contract, tort or in the context of public law damages. Secondly, mandatory orders will be available against the State itself so that courts no longer have to distinguish the actions of officers from the actions of the State. Thirdly, there will be no presumption that the State is exempt from statutes. Fourthly, the State will act in its own name in proceedings instead of using Queen or the Attorney-General as proxy.

Finally, the proposed State theory will reconceive all executive power as emanating from a statutory source. Statute will replace the prerogative powers and vest these powers in the State.

Residual freedom will be abolished and replaced with the “reasonably incidental” doctrine, which will allow the executive to act only in ways that are reasonably incidental to the achievement of authorised statutory purposes.

The ensuing discussion sets out the above proposals in more detail and explains their implications. It is submitted that replacing the Crown with the proposed State theory will instil greater rationality, coherence and simplicity in New Zealand’s constitutional arrangements.

11.2. An existing State tradition

The State is not a well-developed legal concept in New Zealand. However, the terminology of “the State” already permeates New Zealand law and culture. This section argues that the terminological shift from the Crown to the State would be cultivating this pre-existing tradition rather than transplanting an alien concept. It also addresses potential criticisms that eschewing the language of the Crown would uproot a powerful symbol.

11.2.1. A part of New Zealand culture

The notion of the State as an embodiment of government has been part of New Zealand culture since the turn of the 20th century.¹ In 1904, a visiting political scientist commented on the “perfect mania for appealing to the State”.² He observed that:³

When a colonial finds himself face to face with some difficulty it is almost always to the State that he first appeals. The Government is thus brought to perform functions which in old countries would lie within the province of private initiative.

¹ Michael Bassett *The State in New Zealand 1840 – 1984: socialism without doctrines?* (e-book ed, Auckland University Press, Auckland, 2013) at 8-20; see also Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 146.

² André Siegfried (tr. E. V. Burns) *Democracy in New Zealand* (Bell & Sons, London, 1914) at 52.

³ *Ibid.*

Sinclair writes that settlers had a tendency to engage in the “idealisation of the State”.⁴ A New Zealand Times article from 1906 described life among colonials as “a whole-souled interest in the State”.⁵

The perception of the State as a benevolent force persisted for much of the 20th century. New Zealand solidified its reputation as a “Welfare State”⁶ through a series of social security initiatives, including the introduction of income-tested benefit in 1938 and an accident compensation scheme in 1974. State regulation of the market was widespread and seen as promoting equitable outcomes.⁷

The State has become a more neutral term after the deregulation and privatisation drive of the 1980s – a process that came to be known as “rolling back the State”.⁸ One academic describes New Zealand as having changed from a “Welfare State” to a “well-being enabling State”,⁹ whose role “is to provide the mechanisms and infrastructures by which households can secure their own well-being”¹⁰ instead of directly providing for households’ welfare.

Nonetheless, the State remains firmly associated with the public sector and public service in popular parlance. Expressions such as “State schools” and “State housing” are part of everyday

⁴ Keith Sinclair *History of New Zealand* (Penguin, Auckland, 1959), quoted by Bassett, above n. 1, at 11.

⁵ Keith Sinclair *A destiny apart* (Allen & Unwin, Wellington, 1986) at 75, quoted by Joseph, above n. 1, at 146.

⁶ Martin Johnston “Cradle to grave in New Zealand – was the Welfare State born in 1938” *New Zealand Herald* (New Zealand, 14 September 2017); Maureen Baker and Rosemary Du Plessis “Family welfare – a model welfare state, 1946 – 1969” (5 May 2011) *Te Ara* <<https://teara.govt.nz>>.

⁷ Bassett, above n. 1, at 260.

⁸ For example, see Jane Kelsey *Rolling back the State: Privatisation of power in Aotearoa / New Zealand* (Bridget Williams Books, Wellington, 1993); Jane Kelsey “Engendering poverty – rolling back the state on New Zealand women” (1993) 23 VUWLR 59; Anne Marguerite de Bruin “Transformation of the Welfare State in New Zealand” (Doctoral thesis, Massey University, 1997) at 170; E Pawson “The State and social policy” in R Le Heron and E Pawson (eds) *Changing places: New Zealand in the nineties* (Longman Paul, Auckland, 1996) 210 at 213.

⁹ de Bruine, above n. 8, at 3.3.

¹⁰ At 81.

language. A number of well-known service providers such as KiwiRail and New Zealand Post are State-Owned Enterprises.¹¹

11.2.2. Existing legal usage

The dominance of the Crown suppresses the language of the State in legal analysis. However, it is submitted that the germs of the understanding that the State embraces the whole public sector are already present in New Zealand law.

Chapter 6 noted that statutory and official descriptions of the State largely align with the ambit of the public sphere. The State Services Commission’s website lists “all the organisations of the State sector”.¹² The list includes all government departments, all Crown entities, Public Finance Act Schedule 4 organisations and Schedule 4A companies, the Reserve Bank, offices of Parliament, State-Owned Enterprises (SOEs) and Mixed-Ownership Model companies. The list shows a confident understanding of which public bodies are part of the State. One contrasts this with the uncertainty regarding which entities are within the Crown’s ambit and the paradox that not all Crown entities are part of the Crown.

The use of State terminology in other statutes reinforces the association of the State with government-provided services. The Education Act 1989 refers to a “State system of education”¹³ and “State schools”¹⁴ while the Housing Act 1955 provides for “State houses”.¹⁵ Among the SOEs listed in Schedules 1 and 2 to the State-Owned Enterprises Act 1986 are New Zealand’s key service-providers in the transport and energy industries.

¹¹ State-Owned Enterprise Act 1986, Schedule 1.

¹² State Services Commission “New Zealand’s State sector – the organisations” (1 February 2018) <<https://www.ssc.govt.nz>>.

¹³ Education Act 1989, ss 2 and 417.

¹⁴ For example, see ss 2 – 5.

¹⁵ Housing Act 1955, for example, ss 3 – 9.

There is a common law tradition across Commonwealth jurisdictions that the State embodies all three branches of government and guarantees their commitment to upholding constitutional rights.¹⁶ Some New Zealand judges have tapped into this tradition in cases concerning public law damages under the New Zealand Bill of Rights Act 1990. In *Simpson v Attorney-General (Baigent's Case)*, the majority of the Court of Appeal held that the "State" is directly liable for breaches of constitutional rights by any branch of government.¹⁷ Hardie Boys CJ described the Bill of Rights Act as "commit[ing] the State to the protection and promotion of [the] rights and freedoms" provided in the Act.¹⁸ Casey J asserted that "the Crown, as the legal embodiment of the State,...is bound...to ensure an effective remedy for the violation of fundamental rights."¹⁹ The majority of the Supreme Court controversially overturned the *Baigent* understanding of the State in *Attorney-General v Chapman*.²⁰ However, Elias CJ in her dissenting judgment insisted on referring to "the State" throughout "to make it clear that, in the Bill of Rights context, 'the Crown' extends to all three branches of the government of New Zealand."²¹ The Chief Justice's dissenting views are a powerful defence of State terminology in New Zealand.

Therefore, in many ways, the proposed shift from the Crown to the State would cultivate a pre-existing tradition. Conceiving the State as an embodiment of all three branches of government would be congruent with the wider Commonwealth tradition on which *Baigent* relied. Aligning the State's boundaries with those of the public sector would also be consistent with the tendency in New Zealand statutes to use the term "State" to refer to the wider public sector. The shift from Crown to State would require little change in popular parlance because terms such as "State schools" and "State housing" are part of everyday language. The only linguistic difference for the

¹⁶ *Maharaj v A-G for Trinidad and Tobago* [1978] 2 All ER 670 at 679, per Lord Diplock.

¹⁷ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667; 1 HRNZ 42 at 58, per Cooke P; 74, per Casey J; 84, per Hardie Boys J; 104, per McKay J.

¹⁸ At 81.

¹⁹ At 104.

²⁰ *Attorney-General v Chapman* [2011] NZSC 110; see Section 5.3.3.

²¹ At [14].

wider population would be that the term “Crown” and related terms such as “Her Majesty’s government” would fall out of use.

11.2.3. Symbolic significance

Discarding the language of the Crown would undermine some important symbols in the representation of New Zealand government. However, the ensuing paragraphs contend that there should not be any major cultural or political impact from the terminological shift. The proposed State theory retains the monarch as the Head of State and the State is likely to fill the symbolic vacuum left by the Crown in many respects.

The Crown is a powerful symbol of the Commonwealth. Joseph describes the Crown as playing a “supra-national role as symbolic head of the Commonwealth”.²² The use of the single word “Crown” therefore conveys much of New Zealand’s historic and cultural ties. It shows that New Zealand is a former British colony, recognises the Queen as the Head of State, and is a member of the Commonwealth realms. Shore and Kawheru write that the connection with the Commonwealth through the common symbolism of the Crown reduces “New Zealand’s sense of isolation” born out of its remote location.²³ The word “State” would not evoke the same sense of membership with the Commonwealth. “State” is a more generic expression and would not divulge the insights into New Zealand’s history and culture that the Crown does.

It is submitted that adopting the language of the State would not undermine New Zealand’s historic and cultural ties with the Commonwealth. The Queen would still be the Head of State and New Zealand would remain a constitutional monarchy. These are more powerful indicators of New Zealand’s Commonwealth connection than the word that lawyers and the public use to refer to the government.

²² Joseph, above n. 1, at 623.

²³ Cris Shore and Margaret Kawharu “The Crown in New Zealand” (2014) 11(1) Sites: New Series 17 at 31.

A second consideration when replacing the Crown is that the Crown has a human face that the State lacks. The State is an impersonal abstraction of government whereas the Crown is embodied within the familiar and reassuring image of the Queen. Shore, Williams and Raudon write:²⁴

[T]he Crown is enduring, recognisable and approachable: it has a “face” that people know and can see daily on their coins; it is someone who can be petitioned, spoken to and held to account; it can express feelings of regret, remorse, humility and responsibility. People can engage personally with the Crown, and its personification can engage with the people[.]

The human face of the Crown holds special significance for many Māori.²⁵ The Crown is the symbolic link between the Queen, whose name appears as signatory to the Treaty of Waitangi, and the executive government, with whom Māori negotiate for settlements under the Treaty. McLean observes that that “many, often older Māori, do not trust governments but they do trust the Crown.”²⁶ Some Māori may struggle to develop the same sense of trust in the impersonalised State that they have reposed in the Crown.

The thesis accepts that a shift from the Crown to the terminology of the State would deprive popular imagination – Māori in particular – of this humanised manifestation of government. However, it is submitted that the symbolic value of a humanised government comes at a high legal cost. The preceding chapters have identified these costs. To reiterate: New Zealand law continues to foster the illogical analogy of the Crown as a corporation sole denoting the Queen,

²⁴ Cris Shore, David Williams and Sally Raudon “Conclusion – the future of the Crown in an age of uncertainty: sempiternal or crumbling foundation?” in Cris Shore and David Williams (eds) *The shapeshifting Crown – Locating the State in postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press, Cambridge, 2019) 245 at 259.

²⁵ Shore and Kawheru, above n. 23, at 23 – 25; Sally Raudon “Indigenous peoples and the Crown – The sacred duty” in Cris Shore and David Williams (eds) *The shapeshifting Crown – Locating the State in postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press, Cambridge, 2019) 75 at 81, 83 – 84, 87 and 91; see generally Janet McLean “Crown, Empire and redressing historical wrongs of colonisation in New Zealand” [2015] NZLRev. 187.

²⁶ McLean, above n. 25, at 197.

which denies the executive government a distinct legal personality from the Sovereign.²⁷ The maxim “the king can do no wrong” continues to affect the rules of Crown liability in tort²⁸ and deter courts from granting mandatory orders against the Crown.²⁹ The sources of executive authorisation that derive from the Crown, namely the prerogative and residual freedom, are both inappropriate within the modern constitutional framework.³⁰ These costs are disproportionate to the symbolic value of a humanised government.

Further, the term “State” may appeal more than the Crown to many Māori because it would indicate that all three branches of government have duties under the Treaty.³¹ The current terminology referring to the Crown as a Treaty partner suggests that only the executive branch has a duty to act as a Treaty partner.³² By contrast, describing “the State” as a Treaty partner would indicate that Parliament, courts and the executive branch each have a duty respectively to create, interpret and apply the law consistently with the Treaty’s principles.

Some writers suggest that the ambiguity of the Crown is a valuable political tool in Treaty negotiations, so that State terminology would not adequately replace the Crown. Shore and Kawheru find that both Māori and the executive make tactical use of the Crown’s ambiguity and cast it as “a convenient ‘Other’”.³³ Māori depict the Crown as both colonial oppressor and higher authority of appeal.³⁴ The executive depicts the Crown as an entity distant from the government of the day to avoid accusations of bias or perceptions of a conflict of interest.³⁵ Similarly, McLean describes the language of the Crown as “an instrument of Imperial statecraft”. She writes:³⁶

²⁷ See Chapter 4.

²⁸ See Chapter 7.

²⁹ See Chapter 8.

³⁰ See Chapter 10.

³¹ See Section 11.4.

³² See Section 5.4.

³³ Shore and Kawheru, above n. 23, at 25.

³⁴ Ibid.

³⁵ At 34.

³⁶ McLean, above n. 25, at 211.

The various and nuanced ways in which notions of the Crown operate in the settlement processes demonstrate that the “New Zealand government” or even “New Zealand state” would unlikely be an adequate substitute.

It is correct that the term “State” under the proposed State theory would not have as “various and nuanced” uses as the term “Crown” because of its greater clarity of meaning. However, the State would still fulfil the role of the “Other” in Treaty disputes. This is because the State is, like the Crown, a permanent embodiment of government. It would continue to carry the Crown’s historic obligations under the Treaty and symbolically transcend the executive government.³⁷

It is further submitted that the greater clarity in the legal meaning of the State would offset any loss in political mileage as a result of discarding the term “Crown”. A considerable advantage of the word “State” over the word “Crown” is that it has less historic baggage and is therefore easier to define more clearly. Chapters 4, 5 and 6 showed that the Crown has acquired layers of contradictory meanings throughout history. It is variously the Queen, a corporation sole, a corporation aggregate, a part of the executive, the entire executive, a part of the wider public sector, the entire public sector, one branch of government and all three branches of government. Statutory and common law definitions of the Crown are thoroughly inconsistent. It would be well-nigh impossible to sweep aside all but one meaning of the term “Crown”. Moreover, the plain English meaning of the word “Crown” means that it would still associate the legal personality of government with the personality of the Queen. By contrast, the relatively consistent use of the term “State” to denote the wider public sector means that it would be simpler to define the State unequivocally as the embodiment of all three branches of government and the public sector for the purposes of the proposed State theory.

11.3. A distinct legal personality from the Sovereign

³⁷ See Section 11.7.

Chapter 4 demonstrated that a fundamental shortcoming of the concept of the Crown is that it denies the executive government a separate legal personality from the Sovereign. Statutes often refer to the Crown as a corporation sole comprising the Sovereign alone³⁸ and accord the status of “servants of the Crown” to the executive.³⁹ Such language perpetuates the legal fiction that New Zealand government comprises the Sovereign acting through her servants, whereas the constitutional reality since the mid-19th century is that the executive government is a massive apparatus with a distinct political will from the Sovereign. Attempts to reconceptualise the Crown as a corporation aggregate encompassing the apparatus of executive government have failed to modernise the concept; they have only added a layer of meaning to the many meanings of the Crown.⁴⁰

The proposed State theory corrects this shortcoming by giving the executive a distinct legal personality from the Sovereign. It proposes that New Zealand law should recognise an entity called the State which will embody the government and the public sector.⁴¹ The Queen through her representative, the Governor-General, will continue to occupy the office of the Head of State. The legal personality of the State will be separate from the legal personality of the Head of State.

Distinguishing the State from the Head of State should help construct a more effective State theory than the Crown for several reasons. First, it will jettison the corporation sole analogy and internalise the corporation aggregate analogy. The Sovereign will no longer embody the State. Rather, the State will be a composite entity comprising many offices, one of which will be the office of the Head of State.

³⁸ For example, see Crown Forest Assets Act 1989, s 2(1); Finance Act (No 2) 1990, s 2; Māori Purposes Act 1993, s 3; National Provident Fund Restructuring Act 1990, s 2; New Zealand Public Health and Disability Act 2000, s 6(1); Post Office Bank Act 1987, s 2; Rural Banking and Finance Corporation of New Zealand Act 1989, s 2(1); State-Owned Enterprises Act 1986, s 2.

³⁹ For example, see s 6(1)(a) of the Crown Proceedings Act 1950.

⁴⁰ See Section 4.7.

⁴¹ See Section 11.4.

Secondly, the proposed reform will align the legal representation of the executive government with 21st century political reality. It will be recalled from Chapter 4 that Salmond had observed:⁴²

We speak of the property of the Crown, when we mean the property which the King holds in right of his crown. So we speak of the debts due to by the Crown, of legal proceedings by and against the Crown, and so on...

The proposed State theory will put these archaic practices to rest. The State will hold property and collect taxes in its name and not in the Sovereign's name.⁴³ The State will also bear the Crown's obligations under statutes, judgments, contracts and other legal instruments. As Section 11.5.4 establishes, it will not be necessary to use "Rex" or "Regina" to represent the government in prosecutions. The State will be able to prosecute in its own name. These changes will allow the law to expressly recognise that the executive branch is now distinct from the Sovereign and not a servant of the Sovereign.

Thirdly, the fact that the State will have a distinct legal personality from the Head of State should make it conceptually clearer that the State's powers and privileges should have a more rational justification than the fact that the Sovereign used to enjoy these powers and privileges historically. The concept of the Crown allows the executive to enjoy the Sovereign's powers and immunities. The proposed differentiation of the State from the Head of State will help clarify that the State's powers and privileges should derive from, and be proportionate to, the functional requirements of carrying out the democratic mandate.

⁴² John W. Salmond *Jurisprudence* (4th ed, Stevens and Haynes, London, 1913) at 296.

⁴³ This thesis does not intend to address the question whether radical title to non-Māori-owned land that currently vests in the Crown should vest in the State. The fact that radical title vests in the Crown is a residue of the concept of feudal tenure, as the king of England once held title to all land: see Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand* (Auckland University Press, Auckland, 2017) at 44 – 48. There appears to be no conceptual basis for transferring radical title from the Crown to the State given that the State is an entity distinct from the Sovereign. Quentin-Baxter and McLean have suggested alternatives to feudal tenure for New Zealand, such as a system of allodial title, conceiving the Treaty of Waitangi as the source of all land title, or developing a non-ownership-based model for control of public land. These may be more appropriate alternatives to transferring radical title from the Crown to the State.

The distinction between the State and the Head of State will not affect New Zealand's status as a constitutional monarchy. The role of the Governor-General as the representative of the Head of State will remain unchanged. He or she will continue to act on ministerial advice and carry out constitutional functions such as summoning and dissolving Parliament or providing royal assent to bills, albeit these functions will be governed by statute rather than the prerogative, as discussed in Section 11.6 below. Should New Zealand become a republic, the Governor-General can be replaced with a President of New Zealand in the office of the Head of State.

11.4. The ambit of the State

The proposed State theory defines the "State" as an entity that represents the executive, the legislature, the judiciary and the public sector. This definition equates the boundaries of the State with the scope of application of the New Zealand Bill of Rights Act 1990 and Part 1A of the Human Rights Act 1993, which applies to the same set of entities.⁴⁴ Section 3 of the Bill of Rights Act provides:

3 Application

This Bill of Rights applies only to acts done –

- (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

There are two reasons for this choice of definition for the State. The first is that it would eliminate the uncertainty surrounding whether the Crown embodies the executive alone or all three branches of government. Secondly, it would provide a coherent embodiment of the entire public

⁴⁴ Human Rights Act 1993, s 20J.

sector, unlike the Crown. The ensuing discussion explains these reasons and explores the implications of the proposed definition.

11.4.1. An embodiment of all three branches of government

Chapter 5 demonstrated the ambiguity surrounding whether the Crown embodies the executive alone or all three branches of government. To recapitulate: the word “Crown” usually denotes the executive branch alone.⁴⁵ This was one of the reasons why the Attorney-General submitted in *Chapman* that the Crown could not be liable for judicial breaches of the New Zealand Bill of Rights Act 1990. The Attorney-General argued that “New Zealand domestic law knows no such concept as “the State” and the Crown refers “only to the executive branch.”⁴⁶ The majority of the Supreme Court failed to clarify the legal position in light of this argument. McGrath and William JJ simply stated that they were “not persuaded... that there is no concept of the state in New Zealand domestic law”.⁴⁷ It is unclear whether their Honours thought that the concept of State denotes the Crown as executive alone, or that the State embraces all three branches without assuming liability for the actions of the judicial branch.⁴⁸

By contrast, several judges have posited that the Crown embodies all three branches of government in accordance with s 3(a) of the Bill of Rights Act. McKay J in *Baigent* called the Crown “the legal embodiment of the State” and stated that the Bill of Rights Act applies “to acts by the legislative, executive or judicial branches of the Government”.⁴⁹ Hardie Boys CJ also observed in *Baigent*:⁵⁰

⁴⁵ See Section 5.2.

⁴⁶ *Chapman*, above n. 20, at [14].

⁴⁷ At [205].

⁴⁸ See Section 5.3.3.

⁴⁹ *Baigent's case*, above n. 17, at 104.

⁵⁰ At 86.

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms.

Likewise, Elias CJ used the expression “State” instead of “Crown” in *Chapman* “to make it clear that, in the Bill of Rights context, ‘the Crown’ extends to all three branches of the government of New Zealand.”⁵¹

The proposed definition of the State will eliminate the ambiguity left by the majority in *Chapman* by confirming that the State embraces all three branches of government in accordance with s 3(a) of the Bill of Rights Act. It will close the avenue for the argument that New Zealand law recognises no legal entity that can be sued for legislative and judicial breaches of the Bill of Rights Act. The State will have the legal personality to be sued in respect of the actions of any of the three branches of government. Any exemption from suit on the grounds of policy would have to be conferred by statute, as discussed further below.⁵²

11.4.2. A State that embraces the whole public sector

Chapter 6 identified the lack of correlation between the ambit of the Crown and the ambits of the executive branch and the wider public sector. It showed that statutory definitions of the Crown are inconsistent and that the common law tests of control, prejudice and function draw conflicting boundaries around the Crown. The control test construes the Crown more narrowly than the executive branch;⁵³ the prejudice test makes the Crown potentially broader than the public sector;⁵⁴ the function test equates the Crown with the province of government but is now largely obsolete.⁵⁵

⁵¹ *Chapman*, above n. 20, at [14].

⁵² See Section 11.4.4.

⁵³ See Section 6.3.1.

⁵⁴ See Section 6.3.2.

⁵⁵ See Section 6.3.3.

The proposed State theory expels these incoherencies by defining the State as the entire public sector. It uses s 3(b) of the New Zealand Bill of Rights Act 1990 as the demarcator of the public sector. Section 3(b) provides that “any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.” Thus, the proposed State theory would include within the State any entity that performs a public function, power or duty.

The use of the concept of “public function” to demarcate the State may seem a surprising choice given the academic criticism levelled against the historical function test. It will be recalled that 19th century courts used to determine whether or not an entity should enjoy the Crown’s immunity by asking whether “the functions [of the entity] properly belong within the province of government”.⁵⁶ Modern commentators reject the phrase “province of government” because government is “capable of indefinite expansion”.⁵⁷ It is Parliament rather than the courts which now decides which functions government should perform and which it should privatise.⁵⁸

The proposed State theory does not suggest a return to the historical function test. Modern enquiries into the ambit of s 3(b) of the Bill of Rights Act have a fundamentally different approach to assessing “publicness”. In *Ransfield v Radio Network Ltd*,⁵⁹ Randerson J identified several “non-exclusive indicia”⁶⁰ that courts should take into account to determine whether an entity is carrying out a public function. These are:⁶¹

- (i) whether the entity is publicly owned or is privately owned and exists for private profit;
- (ii) whether the source of the function, power or duty is statutory;
- (iii) the extent and nature of any governmental control of the entity;

⁵⁶ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 326 – 327.

⁵⁷ Peter Hogg, Patrick Monahan and Wade Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011) at 463.

⁵⁸ JAG Griffith “Public corporations as Crown servants” (1952) 9(2) UTLJ 169 at 184.

⁵⁹ *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233.

⁶⁰ At [69].

⁶¹ *Ibid*.

- (iv) whether and to what extent the entity is publicly funded in respect of the function in question;
- (v) whether the entity is effectively standing in the shoes of the government in exercising the function, power or duty;
- (vi) whether the function, power or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public;
- (vii) whether coercive powers analogous to those of the State are conferred;
- (viii) whether the entity is exercising functions, powers or duties which affect the rights, powers, privileges, immunities, duties, or liabilities of any person;
- (ix) whether the entity is exercising extensive or monopolistic powers; and
- (x) whether the entity is democratically accountable through the ballot box or in other ways.

These indicators of publicness avoid the criticisms against the historical function test because they do not reflect any pre-set notion that certain functions fall within the province of government. The indicators can accommodate shifting boundaries of publicness in accordance with what Parliament considers government's functions to be.

It is submitted that a public sector that is determined with reference to the *Ransfield* indicators of publicness would be conceptually a fitting demarcator of the State. It would construe the State as comprising all entities that have the obligation to uphold the rights and freedoms under the Bill of Rights Act and the Human Rights Act. The use of these constitutional rights statutes to demarcate the State would signify a fundamental shift in the legal understanding of the purpose of the State compared to the purpose of the Crown.⁶² Chapter 6 noted that the Crown's boundaries evolved as a result of courts striving to identify which entities should enjoy the immunities that were once unique to the Sovereign. By contrast, the State's boundaries will

⁶² Janet McLean *Searching for the State in British Legal Thought* (Cambridge University Press, New York, 2012) at 298 – 299.

demarcate entities that are subject to unique obligations. The use of obligations, rather than immunities, to delineate the State is more consistent with the notion that public responsibility should harness public power.⁶³

An implication of using the function test to delineate the State is that the boundaries of the State will be fluid. The State will include private entities when they are carrying out public functions. Equally, public entities will not be “the State” when they are carrying out private functions. This is not, however, a novel proposition. Courts already recognise that private entities can be subject to the Bill of Rights Act when performing public functions.⁶⁴ Likewise, public entities can be outside the scope of the Bill of Rights Act when carrying out private law functions, such as when they act as an employer.⁶⁵ The proposed State theory will simply accommodate this existing understanding.

11.4.3. Clarifying the ambit of the executive branch

The proposed State theory also provides an opportunity to clarify the demarcation between the executive branch and the public sector. Chapters 3 and 6 commented on the lack of understanding regarding the boundaries of the executive branch. New Zealand’s leading public law textbook provides conflicting descriptions: it includes the entire public sector within the executive branch in one description⁶⁶ but elsewhere excludes a subset of the public sector from the scope of the executive branch.⁶⁷ Further, there is “little judicial appreciation”⁶⁸ of whether

⁶³ *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (CA) at 523, *per* Laws LJ; see Joseph, above n. 1, at 654.

⁶⁴ *Ransfield*, above n. 58, at [68] – [70]; *Low Volume Vehicle Technical Association Inc. v Brett* [2019] NZCA 67 at [23] – [24].

⁶⁵ *Ioane v R* [2014] NZCA 128 at [35] – [36]; *Butler v Shepherd* 2011 WL 3621614 at [59]; Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 96.

⁶⁶ Joseph, above n. 1, at 201

⁶⁷ At 1182.

⁶⁸ Andrew Butler “Is this a public law case” (2000) 31 VUWLR 747 at 754; see conflicting opinions on whether the Police fall within s 3(a) or s 3(b) of the New Zealand Bill of Rights Act 1990 in *R v N* [1999] 1 NZLR 713 at 718; *Noort v MOT*; *Curran v Police* [1992] 3 NZLR 260 at 282 (CA); *Littlejohn v Ministry of Transport* [1990-1992] 1 NZBORR 285 at 299 (HC); *Baigent’s case*, above n. 17, at 714, *per* Gault J (CA).

an entity is subject to the Bill of Rights Act because it is part of the executive branch and therefore within the scope of s 3(a) or because it is performing a public power, function or duty and is therefore within the scope of s 3(b). It was submitted that the concept of the Crown exacerbates this confusion, as neither the control test nor the prejudice test demarcate the ambit of the Crown consistently with the ambit of the executive branch.⁶⁹ Erasing the Crown's distracting boundaries will expose the underlying lack of awareness about the boundary of the executive branch.

It is proposed that there should be a statutory definition of the executive branch. An appropriate definition would include the Sovereign or her representative, the Governor-General, the Executive Council, the Cabinet, the Prime Minister, Ministers, the government departments and agencies that are currently part of the public service as defined in s 27 of the State Sector Act 1988. These entities would be subject to the Bill of Rights Act through s 3(a) of the Act, that is, as part of the executive branch. All other entities that perform a public function, duty or power will be outside the ambit of the executive branch but will be part of the State and subject to the Bill of Rights Act through s 3(b) of the Act. These entities will include Crown entities (to be renamed State entities)⁷⁰ and the Police. However, these entities will be part of the State and subject to the Bill of Rights Act through s 3(b) of the Act. The proposed clarification of the executive branch would give each branch of government a clear boundary and make it significantly easier to describe what the State denotes than what the Crown denotes.

11.4.4. Ambit of State liability

The scope of State liability cannot be synonymous with the proposed ambit of the State, as that would make the State liable for the actions of any entity performing a public function, power, or duty. A Law Commission report reviewing the implications of *Baigent* identified two concerns

⁶⁹ See Section 6.3.1.

⁷⁰ See Section 11.4.5.

with holding the State liable for the actions of all public entities.⁷¹ First, the Public Finance Act 1989 establishes different financial frameworks for various classes of public bodies. The Law Commission considered that “[i]t would be inappropriate to cut across the [Act] by relieving public bodies of legal and financial liability for their own breaches.”⁷² Secondly, holding the State liable might diminish the incentive for public bodies to comply with their obligations.⁷³ The Law Commission identified these concerns in the context of public law damages against the Crown for breaches of the Bill of Rights Act by public bodies. However, the concerns are also relevant in the private law context. A failure to circumscribe the scope of State liability would make the State liable each time that a public body breaches a contract or acts negligently towards a private individual.

It is therefore proposed that Parliament should circumscribe the scope of State liability by listing the public entities for whose actions the State will be liable. A plausible approach would be to hold the State liable for the actions of ministers, government departments, the chief executive officers of those departments, the public servants and contractors working at those departments, and the Police. By contrast, the entities that are currently known as Crown entities (which will be renamed “State entities” under the proposed reform)⁷⁴ can remain liable for their own actions because they are incorporated and have the legal personality to sue and be sued in their own name. Whether or not the State is liable for an entity’s action will not alter the answer to whether or not that entity is part of the State. This is preferable to the current approach, where the answer to whether or not an entity is part of the Crown can change according to whether or not the Crown is liable for that entity’s breaches.

⁷¹ Law Commission *Crown liability and judicial immunity: a response to Baigent’s case and Harvey v Derrick* (NZLC R37, 1997).

⁷² At [88].

⁷³ Ibid.

⁷⁴ See Section 11.4.5.

The breadth of State liability will ultimately be a matter of policy. Parliament can specifically exclude State liability for the actions of certain entities that are part of the State if there are adequate policy reasons. For example, Parliament might decide that the State should not be liable for certain kinds of breaches by the judicial branch because of the policy concerns that McGrath and William JJ identified in *Chapman v Attorney-General*.⁷⁵ Express legislative limits on the State's liability for judicial actions would be preferable to the uncertainty left by *Chapman* as to whether the State includes the judicial branch at all.

11.4.5. The State in statutes

Over 1,000 New Zealand statutes refer to the Crown.⁷⁶ The shift from the Crown to the proposed State theory will require the word "Crown" to be replaced. In many statutes, a simple substitution of "State" for "Crown" will suffice. Other statutes will require more careful consideration of the meaning of Crown to determine how the word should be replaced without affecting the application of the statute in accordance with its purpose. That is because there will be a difference between the ambit of the Crown and the ambit of the proposed State entity.

It would be possible simply to substitute the State for the Crown in statutory contexts that do not raise the question "who or what is the Crown". For example, many statutes use expressions such as "Minister of the Crown"⁷⁷ and "Crown Bank Account".⁷⁸ There is no substantive difference between these expressions and terms such as "Minister of the State" and "State's bank account". Likewise, a statute that provides that "no civil liability" or "no action, claim or demand whatsoever shall lie...against the Crown"⁷⁹ could equally provide that no civil liability or no action,

⁷⁵ *Chapman*, above n. 20, at [185] - [192].

⁷⁶ This figure is obtained by using the search engine of the Parliamentary Counsel Office's *New Zealand Legislation* website <www.legislation.govt.nz>. As at 17 April 2019, a content search of the word "Crown" for legislation in force returns 1,049 results.

⁷⁷ For example, see Official Information Act 1982, s 4; Children's Act 2014, s 6D; Protected Disclosures Act 2000, s 10.

⁷⁸ For example, see Land Act 1948, s 28; Climate Change Response Act 2002, s 89 EPA.

⁷⁹ For example, see Biosecurity Act 1993, s 164; Arms Act 1983, s 71; Antarctic Marine Living Resources Act 1981, s 10.

claim or demand shall lie against the State. “Crown” in these contexts denotes the legal personality of the executive government and “State” would serve the same purpose.

Statutes where it is necessary to ask “who or what is the Crown” require consideration on an individual basis. Several statutes prescribe immunities or distinct rules for entities that are loosely described as “the Crown” or “instruments of the Crown” or “instruments of the Executive Government”.⁸⁰ Courts need to interpret the ambit of these terms to determine whether the immunity or rule applies to an entity in the case at hand. Chapter 6 provided the examples of s 27 of the Crown Proceedings Act 1950 and s CW 38 of the Income Tax Act 2007. To recapitulate, s 27 of the Crown Proceedings Act enables discovery and interrogatories to lie against the Crown, subject to the public interest immunity. Courts have struggled to interpret who the Crown is for the purposes of s 27.⁸¹ Likewise, s CW 38 of the Income Tax Act exempts the incomes of public authorities for certain purposes. Section YA 1 describes “public authority” as including “instruments of the Executive Government”. Courts have equated the term “Executive Government” with the Crown and have used the control test to demarcate the term “instruments of the Executive Government”.⁸² This creates uncertainty about the boundaries of the Crown.⁸³

It would be inappropriate to substitute “State” for the terms “Crown” or “instruments of the Executive Government” without limiting the meaning of the State for the purposes of these sections. This is because the proposed State theory defines the State as comprising any entity performing a public function, duty or power. Parliament would not have intended s 27 of the Crown Proceedings Act or s CW 38 of the Income Tax Act to apply to all such entities.

⁸⁰ For example, see Crown Proceedings Act 1950, ss 6, 17 and 27; Resource Management Act 1991, ss 4(8) and 4(9); Income Tax Act 2007, ss YA 1 and CW 38; Residential Tenancies Act 1986, s 100; see also Law Commission, above n. 71, at 98 – 172, for a list of various statutory protections that apply to the Crown and other entities.

⁸¹ For example, see *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530 (CA); *Berryman v Solicitor-General* [2005] NZAR 512.

⁸² For example, see *Medical Council of New Zealand*, above n. 56, at 326 – 327; *Miller v New Zealand Railways Corp* [2011] NZAR 21 at 24.

⁸³ See criticism of the control test in Section 6.3.1.

It is submitted that the proper approach when replacing the Crown in these sections would be for Parliament to define “the State” as specific entities for the purpose of the immunity or rule. For example, a subsection or schedule to the relevant legislation could provide that “the State” for the purposes of a given immunity or rule means ministers, government departments, chief executive officers and so forth, as appropriate. The key consideration for Parliament when listing the entities should be whether the entity has a functional need for the rule or immunity. Case law on the scope of an immunity could be a useful guideline for Parliament when redrafting the immunity to decide which entities should be subject to it. For example, courts have held that the Commissioner of Inland Revenue and Solicitor-General are both subject to s 27 of the Crown Proceedings Act.⁸⁴ The redrafted s 27 should expressly identify these officers as subject to s 27. The fact that the statute will list the entities to which an immunity or rule will apply would remove the uncertainty that arises from having to interpret “who is the Crown” for the purposes of an immunity or rule.

Several statutes already define the term “Crown”. Legislators will need to consider whether to retain the same definition for the State when replacing the Crown in a statute. It was noted previously that the most common statutory definition for the Crown is “Her Majesty the Queen in right of New Zealand”⁸⁵ or “the Sovereign in right of his or her government of New Zealand”.⁸⁶ This definition would not be appropriate for the State because it would defeat the objective of the proposed State theory of giving the executive government a distinct legal personality from the Sovereign. It is proposed that this definition should be deleted from statutes. A statute will not need to define the State unless it were to confer a specific meaning for the purposes of the statute. The default meaning of the term “State” in the absence of a statutory definition would be the entity that represents all three branches of government and the public sector.

⁸⁴ See *Cates*, above n. 81; *Berryman*, above n. 81.

⁸⁵ Crown Forest Assets Act 1989 s 2(1); Finance Act (No 2) 1990, s 2; Māori Purposes Act 1993, s 3; National Provident Fund Restructuring Act 1990, s 2; New Zealand Public Health and Disability act 2000, s 6(1); Post Office Bank Act 1987, s 2; Rural Banking and Finance Corporation of New Zealand Act 1989, s 2(1); State-Owned Enterprises Act 1986, s 2.

⁸⁶ Crown Proceedings Act 1950, s 2.

Statutes that define the Crown in a specific manner would need to retain the same definition for the State for the latter to be an effective replacement. However, the definitions will need to be amended to remove existing ambiguities. Consider, by way of illustration, the definition of “Crown” in the Public Finance Act 1989. Section 2 provides:

Crown or the Sovereign –

- (a) means the Sovereign in right of New Zealand; and
- (b) includes all Ministers of the Crown and all departments; but
- (c) does not include –
 - (i) an Office of Parliament; or
 - (ii) a Crown entity; or
 - (iii) a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986; or
 - (iv) a Schedule 4 organisation; or
 - (v) a Schedule 4A company; or
 - (vi) a mixed ownership model company; or
 - (vii) an entity named or described in Schedule 6

The State under the proposed reform can retain the same definition but with some amendments. First, the words “or the Sovereign” should be deleted because the Sovereign and the State will no longer be synonyms. Subsection (a) of the definition should also be deleted for the same reason. Thirdly, the word “means” should replace the word “includes” in subsection (b) to avoid ambiguity about what else the State denotes in the context of the statute other than the entities expressly identified in the definition. Fourthly, references to the Crown within the definition would need to become references to the State. Thus, subsection (b) would state “all Ministers of the State and all departments” and subsection (c)(iii) would refer to “a State entity”. The redrafted definition would be:

State means all Ministers of the State and all departments but does not include –

- (i) an Office of Parliament; or
- (ii) a State; or

- (iii) a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986;
or
- (iv) a Schedule 4 organisation; or
- (v) a Schedule 4A company; or
- (vi) a mixed ownership model company; or
- (vii) an entity named or described in Schedule 6.

It is submitted that the redrafted definition would be pithier and easier to interpret because it would be more prescriptive. It would also eliminate the current inconsistent usage of “Crown” and “State” in the statute.

A further consideration for legislators would be how to approach existing statutory references to “the Sovereign” or “Her Majesty”. Some statutes use these terms to denote the Queen in her personal capacity or as Head of State. These references to the Sovereign would not need to change because the Sovereign will remain the Head of State under the proposed State theory. For example, s 2 of the Constitution Act 1986 provides “The Sovereign in right of New Zealand is the head of State of New Zealand”. Section 74(a) of the Evidence Act 2006 states that the Sovereign cannot be compelled to give evidence. Neither section will need to be redrafted because both refer to the Sovereign as an individual.

Elsewhere, however, the words “Sovereign” or “Her Majesty” imply the government as a legal person. It is submitted that the word “State” should substitute the Sovereign in such contexts. For example, the definition of official under s 378(7) of the Food Act 2014 includes “any person in the service of Her Majesty in right of New Zealand...or any member or employee of any local authority or public body”. It is clear that the words “Her Majesty the Queen in right of New Zealand” refer to the government rather than the Queen as a person. Accordingly, “officer” should be redefined as “any person in the service of the State.”

Statutes requiring allegiance to the Sovereign merit special treatment. At present, persons making promissory oaths and affirmations need only to take an oath to serve Her Majesty and

her heirs and successors.⁸⁷ The oaths do not require allegiance to the State. Similarly, “offences against the Sovereign and the State” under Part 5, subpart 1 of the Crimes Act 1961 only apply to persons “owing allegiance to the Sovereign in right of New Zealand”.⁸⁸ There is no requirement of allegiance to the State. This is unproblematic at present because the Sovereign embodies the State in New Zealand. However, the proposed State theory will make the State a legal entity that is distinct from the Sovereign. This would prompt the question whether allegiance to the Sovereign – the Head of State – amounts to allegiance to the State. One option would be to redraft the statutory language of oaths as undertakings to serve “the State of New Zealand”. However, this would risk deifying the State and conferring on it the same halo that surrounds the Crown. Further, the symbolic value of swearing allegiance to the impersonal State may be less than swearing allegiance to a living person. A preferable option would be to retain the statutory language of oaths without amendment until such time as New Zealand becomes a republic. However, there should be a provision that clarifies that allegiance to the Sovereign also means allegiance to the State of New Zealand.

The preceding discussion provides some guidelines regarding how the State will replace the Crown in legislation under the proposed State theory. It is undeniable that redrafting legislation in this manner would be a time-consuming and resource-intensive exercise. However, it is submitted that such redrafting would enhance clarity and conceptual consistency in New Zealand legislation. In particular, requiring Parliament to specify which entities are subject to the immunities that currently attach to “the Crown” would encourage lawmakers to turn their mind to the functional need of the various public entities. As a result, the redrafted immunities should be more proportionate than the blanket immunities that attach to the Crown.

11.5. The State in legal proceedings

⁸⁷ Oaths and Declarations Act 1957, ss 17, 18, 20, 21.

⁸⁸ See Crimes Act 1961, ss 73, 74, 75, 77, 78, 78A.

The thesis has previously exposed the numerous issues surrounding the Crown in legal proceedings. First, Crown liability in tort is contingent on establishing wrongdoing by individual officers. This makes it difficult to justify finding the Crown liable where an officer enjoys a statutory immunity from tortious liability.⁸⁹ It also makes it conceptually challenging to impose institutional liability on the Crown.⁹⁰ Secondly, the Crown's immunity from mandatory orders is disproportionate to the executive's functional needs and makes it necessary to distinguish individual officers from the Crown.⁹¹ This leads to deep-seated uncertainty surrounding whether or not a minister is acting as the Crown.⁹² Thirdly, the presumption of Crown immunity from statute is unjustifiable and forces complex enquiries into whether a statute applies to the Crown and whether an entity claiming the benefit of the presumption is the Crown.⁹³ Fourthly, there is little rhyme or reason behind the conventions regarding who represents the Crown in a proceeding: it can be Regina, the Attorney-General, the government department, the minister or the chief executive of the department.⁹⁴

The proposed State theory will resolve these issues through the following reforms. It will establish direct State liability across contract, tort and public law damages. It will abolish the immunity from mandatory orders and the presumption of immunity from statute. Finally, it will enable the State itself to be named as party in criminal and civil. The ensuing discussion explains these reforms and their implications in more detail.

11.5.1. Direct State liability

11.5.1.1. Conceptual justification

⁸⁹ See Section 7.5.2.2.

⁹⁰ See Section 7.5.2.1.

⁹¹ See Section 8.2.

⁹² See Section 8.3.

⁹³ See Chapter 9.

⁹⁴ See Section 4.6.

The premise of direct State liability is that the acts and omissions of officers, whether or not lawful, are the acts and omissions of the State itself. This reflects the reality that an artificial entity such as the State can only act through its human agents.⁹⁵ Several New Zealand statutes use direct liability as the underlying principle of corporate liability. For example, s 160 of the Health and Safety at Work Act 2015 attributes the states of mind of directors, employees and agents to their employee. Section 18 of the Companies Act 1993 prevents a company from disclaiming the unauthorised actions of its directors, employees and agents in relation to affected third parties. These statutes recognise that directors, employees and agents represent their corporate employers and accordingly enforce the obligations directly on the corporate employer.

The proposed State theory will internalise the corporation aggregate analogy.⁹⁶ It is therefore fitting that this “corporate” State should be directly liable for the acts and omissions of its officers and the employees and contractors of those entities that comprise the State. This is subject to the requirement that Parliament will limit the State’s liability to a specified set of entities.⁹⁷ Other public entities will remain liable for the actions of their employees and contractors.

A second reason for adopting direct State liability is that individuals who comprise the State act within a centralised and hierarchical system.⁹⁸ An individual error reflects a shortcoming not only on the part of the individual but also on the system as a whole. To quote Blanchard J, it is the “having an inadequate system which in itself ...create[s] a breach of a duty of care” on the part of the State.⁹⁹ Direct liability recognises this collective failure whereas vicarious liability treats the failure as primarily that of an individual employee.

⁹⁵ Hogg, Monahan and Wright, above n. 57, at 17.

⁹⁶ See Section 11.3.

⁹⁷ See Section 11.4.4.

⁹⁸ McLean, above n. 62, at 222; Harold J Laski “The responsibility of the State in England” (1919) 32(5) Harv L. Rev. 447 at 451.

⁹⁹ *Couch v Attorney-General* Transcript SC49/2006, 17 April 2007 at 50, quoted by Rachael Baillie “A square peg in a round hole: reshaping the approach to systematic negligence in the modern public service” (2014) 20 AULR 45 at 45 – 46.

A potential criticism that direct State liability could face is that it promotes a “teleological inconsistency”.¹⁰⁰ It will require one branch of the State (the judiciary) to find that the State itself is liable for the actions of another branch of the State (the executive). Kelsen writes:¹⁰¹

A delict which is a violation of the national legal order cannot be interpreted as a delict of the State, cannot be imputed to the State, since the sanction – which is the legal reaction to the delict – is interpreted as an act of the State. The State cannot – figuratively speaking – “will” both delict and sanction. The opposite view is at least guilty of a teleological inconsistency.

It is submitted that Kelsen’s criticism overlooks the doctrine of separation and balance of powers. The doctrine recognises that each branch of the government has a constitutional duty to impose checks and balances on the actions of the other branches.¹⁰² This makes it inevitable that the State will have to act against itself when one branch holds another branch to account.

Further, Kelsen’s criticism assumes that the State can will a sanction but not a delict. It mirrors the maxim “the king can do no wrong”. There is little benefit in replacing the Crown with a State that also cannot do wrong. The concept of an infallible State would continue to justify distinguishing the actions of officers from the actions of the State, eventuating in the same confusions about whether an officer is acting as the State or as an individual officer or in his or her personal capacity. The proposed State theory will treat the State as an amoral composite entity that is only as good or as bad as the individuals through which it acts. Thus, there would be no inconsistency in holding that errant officers and law-enforcing courts are both manifestations of the same State.

11.5.1.2. Implications for contract, public law and tort

¹⁰⁰ Hans Kelsen (tr Anders Wedberg) *General theory of law and State* (1949, Harvard University Press, Cambridge, Massachusetts) at 199.

¹⁰¹ Ibid.

¹⁰² Joseph, above n. 1, at 199.

Establishing direct State liability in contract law should be relatively straightforward because contract law already has the conceptual foundations. McLean writes that “[c]ontract law tends to conceive of the Government actor as...a single authority representing the State and able to undertake commitments on behalf of the whole.”¹⁰³ She notes that “[i]t is the ‘Government as a whole’ that enters into and is liable under a contract.”¹⁰⁴ Consistently with this position, an officer has no personal liability for a breach of contract: it is the Crown as a whole that is liable.¹⁰⁵ The proposed State theory will retain these existing principles of contractual liability.

The groundworks for direct State liability are also in place in the context of public law damages. In *Maharaj v Attorney-General of Trinidad and Tobago*, the Privy Council held that judicial breaches of constitutional guarantees led “not [to] vicarious liability” but to “a liability of the state itself”.¹⁰⁶ The New Zealand Court of Appeal adopted *Maharaj* in *Baigent’s case* and recognised that the Crown, as “the legal embodiment of the State”, was directly liable for breaches of the New Zealand Bill of Rights Act 1990 by any branch of the government or by any public functionary.¹⁰⁷ However, the majority judgment of the Supreme Court in *Attorney-General v Chapman* has left uncertain the status of much of the dicta in *Baigent* about State liability.¹⁰⁸

The proposed State theory will reverse the effect of the majority judgment in *Chapman* and endorse the *Baigent* understanding that the State is directly liable for breaches of the Bill of Rights Act by any of the three branches of government. There will be no exception for the judicial or legislative branches unless Parliament decides to create specific exceptions for policy reasons.

¹⁰³ Janet McLean “The Crown in contract and administrative law” (2004) 24(1) OJLS 129 at 136.

¹⁰⁴ At 131.

¹⁰⁵ *MacBeath v Haldimand* (1786) 1 TR 172; 99 Eng. Rep. 1036; *Dunn v MacDonald* [1897] 1 QB 401 (QB) and 555 (CA) at 557; *The Prometheus* (1949) 82 Ll. L. Rep. 859; *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813 at 831 - 832; *Chitty on Contracts – Volume 1* (31st ed, Sweet & Maxwell, London, 2012) at 852; Nicholas Seddon *Government contracts* (5th ed, the Federation Press, Sydney, 2013) at 131.

¹⁰⁶ *Maharaj*, above n. 16, at 679.

¹⁰⁷ *Baigent’s case*, above n. 17, at 58, *per* Cooke P; 74, *per* Casey J; 84, *per* Hardie Boys J; 104, *per* McKay J.

¹⁰⁸ *Chapman*, above n. 20; see discussion in Section 11.4.1.

The ambit of State liability for breaches by the wider public sector will be circumscribed by statute as proposed in Section 11.4.4 above; this will retain incentives for public bodies to comply with the law and avoid conflict with the principles of public sector funding under the Public Finance Act 1989.¹⁰⁹

Tort law currently admits only vicarious Crown liability. The position under s 6(1)(a) of the Crown Proceedings Act 1950 is that the Crown is vicariously liable for a servant or agent's wrong. It appears that the Crown cannot be directly liable except as an employer or an owner, occupier, possessor or controller of land.¹¹⁰ The proposed State theory will repeal s 6 of the Crown Proceedings Act and replace it with a provision that the State will be directly liable whenever a public entity commits a wrong and the entity is one for which Parliament makes the State liable, as proposed in Section 11.4.4.

Direct State liability will permit the State to be liable even where an officer enjoys a statutory immunity. This is because the acts or omissions of the officer – whether or not legal – will also be the acts or omissions of the State. On the other hand, the statutory immunity will only attach to the officer and not protect the State. The proposed State theory will therefore avoid the analytical complexities posed by ss 6(1) and 6(4) of the Crown Proceedings Act, which were discussed in Section 7.5.2.2.

Direct State liability will also make it easier to hold the State liable for institutional wrongs where the tort comprises the acts or omissions and states of mind of several officers. A claimant would not have to establish wrongdoing on the part of an individual officer: it would be sufficient to establish that the State owed a duty of care and that there was a breach of duty, resulting in

¹⁰⁹ See concerns raised by Law Commission, above n. 71, at [88], addressed in Section 11.4.4.

¹¹⁰ *Couch v Attorney-General (No 2)* [2010] NZSC 27 at [173] and fn 264, *per* Tipping J; at [71], *per* Blanchard J; *Strathboss Kiwifruit Limited v Attorney-General* [2018] NZHC 1559 at [1376], *per* Mallon J; see Section 7.5.2.

damage to the claimant. This would restore the simplicity of the analysis of the government's tortious liability in 19th century New Zealand case law.¹¹¹

For clarity, it would remain possible to sue officers in addition to the State where the officer does not have statutory protection. This would reduce the risk of officers treating the State's direct liability as a personal indemnity in respect of actions in bad faith.

11.5.2. No immunity from mandatory orders

Sections 17(1) and 17(2) of the Crown Proceedings Act 1950 currently immunise the Crown from mandatory orders and also prevent such orders from lying against officers if the effect would be to enjoin the Crown. Section 8.3, above, identified the numerous confusions that stem from these provisions. In particular, courts vacillate between treating ministers as acting as the Crown, acting in their personal capacity, and acting *persona designata*. The former has the undesirable effect of immunising ministers.¹¹² The latter allows ministers to be enjoined but raises the question what the Crown is if ministers acting officially are not the Crown.¹¹³ At other times, courts suggest that ministers can be enjoined in their personal capacity under s 21(2) or s 17(2).¹¹⁴ There is little coherence or consistency between these findings.

The proposed State theory repeals s 17 of the Crown Proceedings Act. It proposes replacing it with a provision that will allow mandatory orders to lie directly against the State when the State is a party to a proceeding. The provision will also allow the court to make a mandatory order

¹¹¹ *R v Williams* [1884] NZPC 1; 9 AC 418; *Dawson v R* (1884) 3 NZLR (CA) 1; see discussion in Sections 7.4.2 and 7.5.2.1.

¹¹² *Harper v Secretary of State* [1955] 1 All ER 331; *Merricks v Heathcote-Amory* [1955] Ch. 567; *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85; *Aratiki Honey v Ministry of Agriculture* [1979] 2 NZLR 311; see Section 8.3.2.2.

¹¹³ *Padfield v Minister of Agriculture Fisheries and Food* [1968] UKHL 1; *R v Home Secretary, ex parte Phansopkar* [1976] QB 606 (CA); *R v Secretary of State, ex parte Herbage* [1986] 3 All ER 210 (QBD); *M v Home Office* [1994] 1 AC 377 (HL); see discussion in Section 8.3.2.3.

¹¹⁴ *Merricks*, above n. 30; *Bird v Auckland District Land Registrar* [1952] NZLR 563; *Fiordland Venison Ltd v MacIntyre* [1979] 2 NZLR 318; *M v Home Office* [1992] 1 QB 271 (CA); see discussion in Section 8.3.2.4.

against any officer or entity that is part of the State if that officer or entity appears in his or her or its own name in a proceeding.

These reforms should significantly simplify legal analysis of the orders available against the executive. Courts can lay to rest the *persona designata* analysis and simply order the State where the State is a party or an officer where the officer is a party.

The availability of mandatory orders against the State will be consistent with the rule of equality before the law. It will bring greater consistency between the remedies available against the executive branch than those available against private parties.

Some may be concerned that courts will use their newfound jurisdiction inappropriately to prevent the State from overriding individual rights in emergencies. It is submitted that this is unlikely. Mandatory orders are a discretionary remedy. Institutional comity will continue to guide the exercise of judicial discretion on whether a mandatory order is appropriate in the circumstances.

11.5.3. No presumption of exemption from statute

Chapter 9 submitted that the presumption that the Crown is exempt from statute should be abolished. The proposed State theory will make the State subject to all statutes. However, it will do so in two phases. Statutes enacted after 2000 will be presumed to bind the State with immediate effect. Statutes enacted on or before 2000 will only become binding on the State after a certain time-frame (for example, three years). The reason for the phased reversal of the presumption is that the drafting practice since 2000 has been for statutes to state expressly whether or not they bind the Crown.¹¹⁵ This makes it highly unlikely that a statute enacted after 2000 will have intended to exempt the Crown without expressly stating so. By contrast, it is

¹¹⁵ Law Commission *To bind their kings in chains* (NZLC SP6, 2000) at [14].

possible that certain statutes enacted on or before 2000 will have relied on the presumption of exemption and intended to exempt the Crown without expressing this intent. The phased reversal of the presumption will give Parliament the opportunity to preserve any specific exemptions that are necessary and appropriate. This will safeguard against the concern that some statutes that were not intended to apply to the Crown will apply to the State with unintended consequences.¹¹⁶

It is further proposed that a statute may only exempt specific entities by express words. Nothing less than express words will rebut the presumption. This will save litigants the uncertainty of disputing whether an entity is exempt from a statute by “necessary implication”.¹¹⁷ It will also improve compliance with the rule of law by subjecting the State to the same set of obligations as private individuals unless Parliament expressly requires otherwise.

11.5.4. Parties in a proceeding

Chapter 4 identified the inconsistent rules for naming the government as a party in legal proceedings: the Crown is never named as a party, and instead is represented by Rex or Regina in criminal proceedings or by the Attorney-General or appropriate government department or officer in civil proceedings.¹¹⁸ Judicial review proceedings are between the applicant and the individual officer or entity.¹¹⁹ The practice of not naming the Crown as a party adds to the Crown’s aura of obscurity. It has caused some to suggest that the Crown lacks legal personality¹²⁰ – a proposition which contradicts the understanding that the Crown is the legal embodiment of the State.¹²¹

¹¹⁶ For example, see Law Commission *To bind their kings in chains* (NZLC SP6, 2000).

¹¹⁷ See Section 9.3.2 for a discussion of the uncertainty arising from whether or not a statute binds the Crown by necessary implication.

¹¹⁸ Crown Proceedings Act 1950, s 14; see Section 4.6.

¹¹⁹ Judicature Amendment Act 1972, s 9(4); Judicial Review Procedure Act 2016, s 9(1).

¹²⁰ Law Commission *The Crown in court – a review of the Crown Proceedings Act and national security information in proceedings* (NZLC R135, 2015) at [2.7] and [2.10].

¹²¹ Joseph, above n. 1, at 1182; see also at 612.

The proposed State theory introduces a more coherent set of rules for naming public sector entities as parties in proceedings. It will allow the State to be named as prosecutor in criminal proceedings and as a party in civil proceedings in place of “Rex”, “Regina” or “Attorney-General”. This would be possible because the proposed State is a legal entity with a distinct legal personality from the Head of State, unlike the Crown. Thus, criminal proceedings that formerly were between “Rex” or “Regina” and the defendant will now be between the State and the defendant. Civil proceedings where the Attorney-General represented the Crown will now be between the private litigant and the State. The fact that the State itself can be a party in proceedings should safeguard against the State from acquiring the same aura of obscurity as the Crown.

The above proposal will not affect the existing practice where statute or common law allows a specific public entity or officer to be named as a party. For instance, statutes such as the Resource Management Act 1991 or the Health and Safety at Work Act 2015 name entities such as the local authority or WorkSafe New Zealand as prosecuting authorities. Judicial review applications require the applicant to name as respondent the person whose act or omission is the subject matter of the application.¹²² It is preferable to retain this specificity rather than have a monolithic “State” represent all these entities in proceedings. The specificity is useful in requiring litigants and their counsel to particularise the claim with sufficient detail. It would be highly unproductive if litigants could simply proceed against “the State” without adequately explaining (or even understanding) which public entity they are suing. Accordingly, these entities will continue to be named as parties in proceedings under the proposed State theory.

11.6. Re-sourcing State power

Chapter 10 established that the sources of authority that derive from the Crown pose several problems. The royal prerogative is a residue of the Sovereign’s historic power to rule.¹²³ Its

¹²² Judicial Review Procedure Act 2016, s 9(1).

¹²³ See Section 10.3.

definition and scope are uncertain¹²⁴ The fact that prerogatives exist independently of parliamentary approval sits uneasily with the constitutional ideal that executive power should be democratically legitimised.¹²⁵ The Crown's residual freedom is also conceptually unsound. It imbues the executive with the freedom to act without positive legal authorisation.¹²⁶ Residual freedom cannot override legal rights but can authorise executive actions that undermine individual liberties.¹²⁷ There is a risk that residual freedom can supplement the scope of statutory power.¹²⁸

The chapter proposed that statutory empowerment should be necessary to authorise any executive action. It recommended that statute should replace and extinguish the prerogative. Further, the reasonably incidental doctrine should replace the concept of residual freedom and confine the executive's authorisation to acts that are reasonably incidental to the purposes authorised within a statute.

The proposed State theory incorporates the reforms suggested in Chapter 10. The ensuing discussion summarises the key points of the reforms and addresses their implications in the context of the proposed State theory.

11.6.1. Statutory replacement of the prerogative

Section 10.3.4 developed a simplified three-step version of Harris's five-step proposal for the statutory replacement of prerogative powers. The proposed State theory adopts the three-step proposal. To summarise: the executive should first obtain a report into the prerogatives that survive at common law and the extent to which legislation already provides a source for these powers. Secondly, a panel of ministers, members of Parliament and constitutional lawyers should

¹²⁴ See Sections 10.3.1 and 10.3.2.

¹²⁵ See Section 10.3.3.

¹²⁶ See Section 10.4.

¹²⁷ See Section 10.4.2.

¹²⁸ See Section 10.4.3.

engage with organisations such as the Law Commission and Legislation Design and Advisory Committee to develop proposals for how legislation will replace the prerogatives that currently have no statutory basis. Thirdly, Parliament should act on the panel's recommendations and commence a programme of statutory replacement of the prerogative. The programme should take place over a finite time-period, such as five years, and will culminate with Parliament abolishing the prerogative as a source of executive power.

There are two key advantages to the statutory replacement of prerogative powers. First, it would align the legal justification for the political reality that Parliament, not the Sovereign is the source of executive authority. As Harris notes, "modern democratic society should aspire to provision through Parliament of those legal authorities which the government needs in order to perform all the functions society wants and expects it to perform."¹²⁹

The second advantage is that abolishing the prerogative after replacing it with statute should bring greater clarity to the scope of executive power. The existence of the prerogative confuses the scope of executive authority in several ways. The number of prerogatives in existence is uncertain.¹³⁰ One Court of Appeal judge has stated that the courts can recognise new prerogatives,¹³¹ defying the established English principle that prerogatives can no longer be created.¹³² Further, the legal position that a prerogative can co-exist with a statute creates immense uncertainty about whether a statute is determinative of the scope of executive authority or whether the prerogative supplements that scope.¹³³ The proposal to make legislation the only source of executive authority would allow courts, the executive and the public to treat the statutory scope as determinative.

¹²⁹ B V Harris "Replacement of the royal prerogative in New Zealand" (2009) 23 NZULR 285 at 287.

¹³⁰ See Section 10.3.2.

¹³¹ *Attorney-General v Mair* [2009] NZCA 625 at [169], per Baragwanath J; see also his Honour's prior decision in *Daniels v Attorney-General* HC AK M 1615-SW99, 3 April 2002, at [47] – [50].

¹³² *Case of Proclamations* (1611) 12 Co Rep 74 at 76; *BBC v Johns* [1965] Ch 32 at 79; Harris, above n. 129, at 298; Joseph, above n. 1, at 646.

¹³³ See Section 10.3.2.

One challenge that legislators would face when replacing prerogatives with statutes is to decide how specific a statute should be. Specificity is generally desirable for clarity about the scope of executive power. However, some prerogatives are necessarily “broad”¹³⁴ or open-ended because their utility lies in enabling the executive to respond to unforeseen scenarios or emergencies where there is no appropriate statutory mechanism for the response. For example, the executive might need to rely on the statutory counterpart of the prerogative of “keeping the peace” to respond to emergencies or urgent unforeseen situations. Statutory conditions on the exercise of the statutory power could inhibit the executive’s ability to respond appropriately. On the other hand, broad empowering provisions might operate as a license for the prerogative to circumvent appropriate statutory safeguards.

The appropriate balance between these competing considerations of specificity and adaptability will vary depending on “nature of the power and the consequences of its exercise.”¹³⁵ In situations where an appropriate balance appears impossible, Parliament might choose to express the prerogative as a principle only and leave the courts to determine the appropriateness of its exercise on a case-by-case basis. It might be sensible for Parliament to replace the notion of “power” with “duty” and the ability to take actions reasonably incidental to the duty. For example, the statute might provide that the State has the duty to keep the peace and the Executive Council has the ability to take any such action that is reasonably incidental to keeping the peace. Parliament might consider it appropriate to safeguard against the risk of the executive using the broad authorisation to circumvent statutory procedures by stipulating that the executive cannot rely on this provision where a statutory procedure exists for a particular action or where the situation does not meet the statutory criteria for “urgency” so that legislative action was possible.

¹³⁴ Joseph, above n. 1, at 692.

¹³⁵ Harris, above n. 129, at 310.

The preceding discussion indicates that an element of uncertainty about the scope of executive power would remain even once statute replaces the prerogative. Nonetheless, the extent of uncertainty would be much less compared to the present situation because courts would not have to consider whether a prerogative supplements a statutory power.

Legislators will have to decide whether the exercise of certain powers should be exempt from judicial review. The fact that powers would now have a statutory source would not in theory change the status of their reviewability because courts can already review the exercise of any prerogative.¹³⁶ However, courts refrain from reviewing the exercise of certain prerogatives out of considerations of justiciability and the nature and quality of the power concerned.¹³⁷ The statutory conditions on the exercise of a power could create more grounds for the judiciary to quash an executive action compared to when the power was a common law prerogative. In many cases, the increase in the number of grounds of reviewability would be welcome. However, the political nature of certain powers means that political control, as opposed to judicial control, would be the proper means of assessing whether that power was rightly exercised. An example is the Governor-General's reserve power to act without ministerial advice. Joseph considers that it would be improper to codify the situations in which the Governor-General can depart from ministerial advice because the decision should be informed by "the Governor-General's interpretation of the political situation."¹³⁸ Parliament can expressly limit the grounds of judicial review for such powers to prevent the threat of legal proceedings from unduly hampering the executive's response.

A further question for legislators would be who should hold a statutory power that replaces a former prerogative. Currently, the Sovereign holds all prerogative powers. Ministers control their

¹³⁶ *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935 (HL) [*GCHQ decision*]; adopted by the New Zealand Court of Appeal in *Burt v Governor-General* [1992] 3 NZLR 672 (CA).

¹³⁷ For example, see *Pora v Attorney-General* [2017] NZHC 2081 at [83] – [103]; *Rewa v Attorney-General* [2018] NZHC 1005 at [34] – [39].

¹³⁸ Joseph, above n. 1, at 752.

exercise by means of the convention that the Sovereign acts on ministerial advice or the fiction that ministers are servants of the Crown, exercising the prerogative on the Sovereign's behalf.¹³⁹ The latter fiction would no longer be appropriate under the proposed State theory because the State and Sovereign would have distinct legal personalities. A minister of the State would not be a servant of the Head of State.

It is proposed that Parliament should vest the statutory powers that replace the prerogative in the State and designate the officers who will exercise these powers on the State's behalf. Prerogatives that are currently exercised by ministers on behalf of the Sovereign will become statutory powers of the State that ministers will exercise on the State's behalf. These include the prerogative in external affairs,¹⁴⁰ the prerogative of keeping the peace¹⁴¹ and the prerogative of *nolle prosequi*.¹⁴² The Head of State (who, it will be recalled, is to be an officer of the State) will exercise those statutory powers of the State that are currently prerogative powers which either the Sovereign or the Governor-General exercises on ministerial advice. These include the rights to be consulted, to encourage and to warn,¹⁴³ the powers of appointment and dismissal,¹⁴⁴ the right of royal assent,¹⁴⁵ the right to summon, prorogue and dissolve Parliament,¹⁴⁶ the power to bestow mercy,¹⁴⁷ the conferment of honours,¹⁴⁸ and the reserve powers to act without ministerial advice.¹⁴⁹

¹³⁹ Quentin-Baxter and McLean, above n. 43, at 39 – 40; Anne Twomey *The veiled sceptre* (Cambridge University Press, Cambridge, 2018) at 5.

¹⁴⁰ Joseph, above n. 1, at 688.

¹⁴¹ At 694 – 695.

¹⁴² *Rewa*, above n. 137, at [20] – [21].

¹⁴³ Joseph, above n. 1, at 661.

¹⁴⁴ At 686.

¹⁴⁵ At 702.

¹⁴⁶ At 701.

¹⁴⁷ At 704.

¹⁴⁸ At 699.

¹⁴⁹ At 723; see also the discussion of who exercises which prerogative power in Quentin-Baxter and McLean, above n. 43, at Ch 4; Twomey, above n. 139, at 5; David Williams "Crown prerogative: Reigning in the powers" in Cris Shore and David Williams (eds) *The shapeshifting Crown – Locating the State in postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press, Cambridge, 2019) 203 at 205; Gail Bartlett and Michael Everett *Briefing paper - The royal prerogative* (Number 03861, 2017) at 9 – 12.

The proposed allocation of roles in the exercise of the State's statutory powers will allow the Governor-General to continue to carry out his or her present constitutional functions as the Head of State's representative. However, the legal basis for these powers would be consistent with democratic authorisation.

11.6.2. "Reasonably incidental" exercise of statutory power

Section 10.4.5 proposed that Parliament should extinguish the executive's residual freedom and replace it with a doctrine of the "reasonably incidental" exercise of statutory power. This doctrine posits that the executive branch has capacity to act only to the extent that the action is reasonably incidental to, or consequential upon, the achievement of a statutory purpose. It is a slight variation of Joseph's version of the doctrine, as Joseph enables the authorising instrument to be either a statute or a prerogative.¹⁵⁰ The proposed State theory replaces prerogative with statutory empowerment and therefore confines the "reasonably incidental" doctrine to the achievement of statutory purposes.

The shift from residual freedom to the reasonably incidental doctrine would make statutes the source of all executive empowerment under the proposed State theory. This would be consistent with the constitutional ideal that the scope of executive authority should be based on democratic mandate.¹⁵¹

The requirement of positive statutory empowerment for executive action would place the executive on a more equal footing with other public bodies. As discussed in Chapter 10.4, public bodies that are not part of the Crown have no residual freedom and can only act in the ways empowered by statute.¹⁵² The proposed State theory will remove the executive's "freedom" and

¹⁵⁰ Joseph, above n. 1, at 657.

¹⁵¹ Harris, above n. 129, at 287.

¹⁵² *Fewings*, above n. 63, at 523, *per* Laws LJ; see Joseph, above n. 1, at 654.

require all executive action to be reasonably incidental to the achievement of a statutory purpose. Using statutory purpose as the demarcator of executive authority would give effect to Laws J's view in *R v Somerset County Council, ex parte Fewings* that the purpose and existence of a public body should be defined by its "public responsibility".¹⁵³

The shift to the "reasonably incidental" doctrine should be eminently feasible. A statutory provision would be sufficient to extinguish residual freedom and lay down the "reasonably incidental" doctrine. Chapter 10.4.5 noted that it may be difficult for the "reasonably incidental" doctrine to empower the executive's contract-making and policy-making functions without express statutory confirmation of these powers. The proposed State theory will accordingly include express statutory confirmation of the executive's contract-making and policy-making functions.

11.6.3. An integrated approach to re-sourcing executive power

Coordinating the proposed reforms of prerogative power and residual freedom would be key to a seamless transition from the current legal position to a system where statutory empowerment is the only source of executive authority. This section outlines the proposed sequence of the proposed reforms.

The relative simplicity of replacing residual freedom with the reasonably incidental doctrine means that the starting point should be the abolition of residual freedom and a statutory recognition of the reasonably incidental doctrine. Initially, it would be necessary to retain the prerogative as a source of positive empowerment along with statutory empowerment. This is because the replacement of prerogative with statute would be an ongoing process managed over a finite time period.¹⁵⁴ Parliament will abolish the prerogative only once the statutory

¹⁵³ *Fewings*, above n. 63, at 523.

¹⁵⁴ See proposals in Sections 10.3.4 and 11.6.1.

replacement of prerogative powers is complete. Subsequently, positive statutory empowerment will be the only source of executive authority.

11.7. The Treaty of Waitangi and the State

The proposed State theory transfers the obligations of the Crown under the Treaty of Waitangi to the State. This will have three implications. First, the fact that the State is to be a distinct entity from the Head of State will mean that there will no longer be any scope for the argument that the Queen is the personal guarantor of the Treaty or owes a personal apology for breaches of the Treaty.¹⁵⁵ It is the State who will be the guarantor.

Secondly, all three branches of government will have the duty to have regard to Treaty principles. This would not be a radical change but a clarification of the current legal understanding. Section 5.4 submitted that the ambiguous usage of “Crown” leaves it uncertain whether the Crown’s obligations with respect to the Treaty refer to the executive’s obligations alone or the obligations of all three branches. Whereas judicial references to the Crown as a “Treaty partner” normally mean the executive,¹⁵⁶ all three branches have recognised the duty to uphold Treaty principles. In particular, Parliament needs to check for consistency with Treaty principles before enacting legislation¹⁵⁷ and courts try to interpret legislation consistently with Treaty principles even where the legislation does not expressly refer to the Treaty.¹⁵⁸ Substituting the Crown for the State would dispel the doubt that the executive alone has the duties of a Treaty partner; the fact that the State embraces all three branches would confirm that the judiciary and legislature also must have regard to the Treaty principles.

¹⁵⁵ See Janet McLean “Crown, Empire and redressing the historical wrongs of colonisation in New Zealand” [2015] NZLRev. 187 at 188; F M Brookfield “The monarchy and the constitution today: a New Zealand perspective” [1992] NZLJ 438 at 439 and 444.

¹⁵⁶ For example, see *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 664; *Paki v Attorney-General* [2014] NZSC 118 at [1].

¹⁵⁷ Joseph, above n. 1, at 82.

¹⁵⁸ *New Zealand Māori Council*, above n. 156, at 656, per Cooke P.

Thirdly, the proposed State theory will change the judicial approach to assessing Māori land claims. Courts will no longer have to ask whether land is “in the hands of the Crown” to determine whether Māori may be able to recover land over which they have an historical claim.¹⁵⁹ As submitted in Section 6.5, the question will instead be whether the land is subject to any private interest. Land that is not subject to any private interest can be returned to Māori, whereas land that is subject to a private interest will not. The focus on private interest would be consistent with s 6(4A) of the Treaty of Waitangi Act 1975, which bars the Waitangi Tribunal from recommending that the Crown acquire or return any privately-owned land to Māori. This approach will avoid the confusion that accompanies the current enquiry into the ambit of the Crown.

11.8. Achieving the shift: the “when” and “how”

There is considerable academic commentary regarding how New Zealand would replace the Crown with a State if it abolished the monarchy and became a republic.¹⁶⁰ These commentaries propose that a written constitution should form the basis of shift to republican “State”. This section argues that the proposed State theory should precede republicanism. It submits that ordinary legislation can achieve the shift from Crown to State; there is no need to make the shift contingent on a referendum.

11.8.1. No need to wait for republicanism

There is a widespread view that republicanism is inevitable, albeit not imminent, in New Zealand. Palmer and Butler write that “[f]or some years now senior politicians, including at least four recent prime ministers have said that the abolition of the monarchy is inevitable.”¹⁶¹ Two of New

¹⁵⁹ *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17; *Accident Compensation Corporation v Stafford* [2018] NZHC 218 at [48], [49], [78], *per* Collins J.

¹⁶⁰ See, for example, B V Harris “The Irish President, the New Zealand Governor-General and the Head of State in a future New Zealand Republic” [2009] NZLRev. 605; Quentin-Baxter and Mclean, above n. 43, at 311 – 335; Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal* (Victoria University Press, Wellington, 2018) at 256 – 383.

¹⁶¹ Palmer and Butler, above n. 160, at 55 – 56.

Zealand's last three prime ministers have publicly identified as republicans;¹⁶² one former prime minister described himself as a monarchist but recognised that "one day probably [republicanism] will happen."¹⁶³ A newspaper poll in 2016 showed that 59% of New Zealanders wanted to oust the monarchy.¹⁶⁴

Some may argue that it would be better to wait until New Zealand becomes a republic before replacing the Crown with the State. That is because the term "Crown" would in any case be replaced with the abolition of the monarchy. It would seem convenient to defer adopting the language of the State until such time, because it would save the cost and effort of introducing the amendments under the proposed State theory and then having to implement further constitutional changes once New Zealand becomes a republic.

It is submitted that there are several reasons why the proposed State theory should precede republicanism. First, the confusions that beset the Crown are unconnected with New Zealand's status as a constitutional monarchy. The confusions arise from the ambiguity of the legal concept of the Crown itself. The preceding discussion of the proposed State theory shows that it is entirely possible for New Zealand to banish these confusions without abolishing the monarchy.

Secondly, the transition to republicanism is contingent on political will. It would almost certainly require a referendum. New Zealand's incumbent Prime Minister has stated that the current government has no intention holding a referendum on whether New Zealand should become a republic¹⁶⁵ and it is uncertain when a referendum will take place. There is no reason to defer clarifying New Zealand's legal understanding of the State until such time.

¹⁶² Anthony Hubbard "Monarchy or republic? The debate for NZ's head of state rages on" (14 January 2018) *Stuff* <www.stuff.co.nz>; Paul Chapman "New Zealand will soon abandon the Queen, says former PM" (8 April 2009) *The Telegraph* <www.telegraph.co.uk>.

¹⁶³ John Hartevelt "NZ steers future of Royal succession" (10 May 2011) *Stuff* <www.stuff.co.nz>.

¹⁶⁴ Stacey Kirk "Nearly 60 per cent of Kiwis want the British Monarchy out – poll" (4 September 2016) *Stuff* <www.stuff.co.nz>.

¹⁶⁵ Hubbard, above n. 162.

Thirdly, abolishing the monarchy would be an extensive constitutional exercise. It is highly likely that lawmakers, politicians and academics would seek to develop a written constitution at the same time that New Zealand becomes a republic.¹⁶⁶ The framers of the written constitution would have to grapple with copious constitutional issues; replacing the Crown with the State would be just one of them. Against this backdrop, the framers of the written constitution are unlikely to be able to devote their attention to eliminating the confusions that make the Crown an inadequate State theory. For example, Butler and Palmer propose a written constitution for a New Zealand republic. They recognise that the Crown is a “vague and mystical concept”¹⁶⁷ and propose replacing it with a State which derives its power from the people instead of the Sovereign. However, the proposal does not address questions such as whether the State will have the Crown’s immunities or what subset of the public sector the State will represent. There is a high risk that the State would continue to pose many of the same problems as the Crown.

It is therefore preferable to clean up the “mess”¹⁶⁸ that is the concept of the Crown before New Zealand chooses to adopt a republican constitution. The amendments that are part of the proposed State theory will make the shift to republicanism considerably easier. The proposed State theory lays the foundations for a republican constitution by separating the legal personality of the State from that of the Queen. It extinguishes the State’s claim to the Sovereign’s immunities and provides for a distinct conceptual basis for State powers than the government’s historical connection with the Sovereign. These reforms would be entirely compatible with a republican constitution. The only change to the proposed State theory that would be necessary should New Zealand become a republic would be that Sovereign’s representative, the Governor-General, would no longer hold the office of the Head of State. Another officer – presumably a President – will occupy that office.

¹⁶⁶ See Palmer and Butler, above n. 160, at 256 – 383; Quentin-Baxter and McLean, above n. 43, at 335.

¹⁶⁷ At 59.

¹⁶⁸ FW Maitland “Crown as Corporation” in FW Maitland and HAL Fisher (ed) *The Collected Papers of Frederic William Maitland* (Cambridge University Press, London, 1911) 244 at 259.

11.8.2. Proposed legislative reform

This section outlines how legislation can achieve the transition from the Crown to the State. It contends that Parliament is competent to enact such reform without the need for a referendum.

11.8.2.1. New legislation

New legislation will need to establish and define the State as a formal legal concept. For convenience, the thesis refers to the proposed new legislation as “the New Zealand State Act”. The Act will abolish the legal concept of the Crown while confirming that the Sovereign occupies the office of the Head of State through her representative, the Governor-General. The Act will also define the State consistently with s 3 of the New Zealand Bill of Rights Act 1990 and s 20J of the Human Rights Act 1993, that is, as comprising all three branches of government and any entity exercising a public function, power or duty. The Act will further include a definition of the executive branch. Section 11.4.3, above, suggested a possible definition.

The New Zealand State Act will also have to confirm that all property, rights, obligations and duties that vests in the Crown at the time of the commencement of the Act will vest in the State unless other legislation expressly provides to the contrary.¹⁶⁹ For clarity, “rights” will not include the immunities that attached to the Crown because of the different boundaries of the State and the Crown, as explained in Section 11.4.5. There should be specific confirmation of the State’s assumption of the Crown’s obligations under the Treaty of Waitangi.

Further amendments to the Constitution Act 1986 will be necessary to consolidate the understanding that the State is a distinct legal entity from the Sovereign. Part 1 of the Act currently begins as follows:

Part 1

¹⁶⁹ See Section 11.3.

The Sovereign

2 Head of State

- (1) The Sovereign in right of New Zealand is the head of State of New Zealand and shall be known by the royal style and titles proclaimed from time to time.
- (2) The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

The headings to parts 2, 3 and 4 of the Constitution Act refer to “the Executive”, “the Legislature” and “the Judiciary” respectively. The part headings reinforce the understanding underpinning the concept of the Crown, namely that the Sovereign embodies the three branches of government and there is no distinct concept of the State.

The amended Constitution Act should recognise that the State is the legal embodiment of all three branches of government and is distinct from the Sovereign. It would therefore be appropriate to rename Part 1 “the State”. Part 1 of the amended Constitution Act should also contain a new section 1A that defines the State consistently with the New Zealand State Act. Section 2 can remain unchanged because the Sovereign will remain the Head of State. Thus, the amended Constitution Act would provide:

Part 1

The State

1A The State

The State has the same meaning as defined in [the relevant section] of the New Zealand State Act [year].

2 Head of State

- (3) The Sovereign in right of New Zealand is the head of State of New Zealand and shall be known by the royal style and titles proclaimed from time to time.
- (4) The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

The New Zealand State Act and proposed amendments to the Constitution Act should not come into force until other legislation can support the shift from the Crown to the proposed State theory. Section 11.4.5 explained the importance of appropriately redrafting existing references to the Crown in statutes. Section 11.6 proposed a three-step approach to replacing prerogative powers with statute. Both exercises in redrafting would take time. The proposed definition of the State should not apply until these steps have taken place.

A new “State Proceedings Act” will be necessary to implement the proposed principles of State liability. The State Proceedings Act should abolish the Crown Proceedings Act 1950. It should provide that the State is directly liable for the unlawful actions of the three branches of government and specific entities, unless the Act or other legislation expressly provide to the contrary.¹⁷⁰ A further provision will establish that the “State” will henceforth replace “Rex” or “Regina” or “Attorney-General” as a party in legal proceedings.¹⁷¹

A schedule to the State Proceedings Act should list the entities for which the State will be directly liable. Many entities which fall within the ambit of the State through s 3(b) of the Bill of Rights Act will not be on this list. That is because, as discussed in Section 11.4.4, it is important to incentivise entities to comply with the law by making them liable for their own breaches of the law.¹⁷² Further, the principles of the Public Finance Act militate against making the central government liable for the actions of all public sector entities.¹⁷³

The State Proceedings Act will need to recognise that the State will not enjoy the Crown’s immunities from mandatory orders or statute. The Act should therefore confirm that courts can make mandatory orders against the State or against any officer or entity that is part of the State.

¹⁷⁰ See Section 11.5.1.

¹⁷¹ See Section 11.5.4.

¹⁷² Law Commission, above n. 71, at [88].

¹⁷³ *Ibid.*

The Act should also provide that all statutes will apply to the State except where the statute expressly states otherwise. However, as discussed in Section 11.5.3, this provision should come into force in two phases. The provision will have immediate effect for all statutes enacted after 2000 but only come into force for statutes enacted in or before 2000 after a specified time period to give Parliament the opportunity to retain any specific exemptions from statute.

11.8.2.2. Parliament's competence to enact reforms

The above proposal calls upon legislation to constitute a new legal entity – the State – which comprises all three branches of government and the public sphere. Legislation must also vest this new entity with the rights and duties that currently attach to the Crown, including the obligations under the Treaty of Waitangi. The questions arise whether Parliament has the power to enact these legislative reforms and if it should do so without a referendum. It is submitted that the answer to both questions is “yes” for the reasons below.

New Zealand has inherited the Westminster doctrine of parliamentary sovereignty. Joseph writes that pursuant to this doctrine, “Parliament enjoys unlimited and illimitable powers of legislation.”¹⁷⁴ There are no substantive limits on the lawmaking powers of the New Zealand Parliament. Its freedom to legislate “transcends even that of Britain, where devolution and European Union membership obligations have effected a de facto surrender of national legislative freedom.”¹⁷⁵

The judiciary recognises legislation to be supreme law in New Zealand. In *Shaw v Commissioner of Inland Revenue*, the Court of Appeal has stated that:¹⁷⁶

¹⁷⁴ Joseph, above n. 1, at 515.

¹⁷⁵ At 529.

¹⁷⁶ *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157, quoting *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330.

The constitutional position in New Zealand...is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.

There is some dicta that the judicial recognition of Parliament's supremacy is contingent on a reciprocal respect on Parliament's part of fundamental common law rights.¹⁷⁷ To date, however, courts have not invalidated or disapplied a statute for inconsistency with common law rights.¹⁷⁸

The doctrine of parliamentary sovereignty appears to give Parliament the competence to enact the necessary reforms to achieve the transition to the proposed State theory. Judicial recognition of the doctrine also indicates that courts will interpret and apply the new statutes and amendments once they are enacted. Nothing in the proposal appears to infringe fundamental common law rights; there is accordingly no reason to anticipate judicial challenge to the proposed reforms.

The proposal does, however, have a paradoxical implication for the doctrine of parliamentary sovereignty. The proposal invokes parliamentary sovereignty to posit that Parliament is to legislate to bring the State into legal existence; yet the fact that the State will be an overarching entity for all three branches, including Parliament, means that Parliament can logically no longer be "sovereign" once the State comes into existence. Nor will it be appropriate to regard the State as sovereign as the State will be subject to the same laws as any individual in the absence of express statutory exemption. This means that New Zealand will cease to have a "sovereign" in the way that Parliament is currently sovereign after the proposal is implemented.

¹⁷⁷ See dicta of Cooke J in *L v M* [1979] 2 NZLR 519 (CA) at 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

¹⁷⁸ Joseph, above n. 1, at 552.

There is considerable philosophical debate about whether sovereignty precludes the power to limit or destroy the sovereign's own powers.¹⁷⁹ Dicey, for example, believed "limited sovereignty" to be "a contradiction in terms" because absolute power was incompatible with the power to limit that power so that it ceased to be absolute.¹⁸⁰ On the other hand, there are many instances of irreversible legislation where Parliament has in effect no power to unmake the law. Joseph provides the example of the Legislative Council Abolition Act 1950 which reconstituted Parliament as a unicameral legislature. Repealing this Act would not revive the former Legislative Council.¹⁸¹ Similarly, statutes conferring independence are irrevocable as freedom once given, cannot be taken back.¹⁸²

It is not within the scope of this thesis to resolve the philosophical paradox of sovereignty. It suffices to note that the paradox is not unique to the proposal – it is inherent in the concept of sovereignty itself.¹⁸³ It is submitted that the paradox is therefore not a basis to doubt Parliament's competence to enact the legislation that results in the transition from the Crown to the proposed State theory.

The more relevant consideration is that nothing in the proposal affects the principle of legislative supremacy. Parliament will continue to be the supreme lawmaking body even after the State comes into legal existence.

One further matter warrant comment. This is whether the nature of the reform makes it more appropriate for the proposal to become the subject of a referendum before Parliament enacts ordinary legislation to achieve the transition. There is no legal obligation on the Government to put matters before a referendum (unless citizens initiate a referendum pursuant to the Citizens

¹⁷⁹ At 538 – 541.

¹⁸⁰ A V Dicey *Introduction to the study of the law of the constitution* (10th ed, Macmillan, London, 1959) at 68.

¹⁸¹ Joseph, above n. 1, at 539.

¹⁸² At 540.

¹⁸³ At 538.

Initiated Referenda Act 1993). However, it is usual for the Government to put matters of widespread political interest or constitutional significance to a public vote. Past referenda on matters of constitutional significance include referenda on the term of Parliament in 1967 and 1990 and referenda for the preferred voting system in 1992, 1993 and 2011.¹⁸⁴

It is submitted that the proposal to shift from the Crown to the State theory is not appropriate subject matter for a referendum. Past constitutional referenda have been about reforms affecting democratic representation. These were topics which directly affected the voting population and where the opinion of the majority was patently relevant. By contrast, the proposed reforms are unlikely to affect the public except individual members of the public who litigate against the Crown. Nor is it reasonable to expect many people beyond the legal profession to be interested in or grasp the relevance of the reforms. Accordingly, there is very little to be gained by holding a referendum on the subject. The costs of holding a referendum would not be justifiable in these circumstances.

11.9. Conclusion

The transition from Crown to State will undeniably be time-consuming and resource-intensive. However, the preceding discussion shows the reform is entirely feasible through ordinary legislation.

¹⁸⁴ Nigel Roberts "Referendums" (20 June 2012) *Te Ara – The Encyclopedia of New Zealand* <<https://www.teara.govt.nz>>.

Chapter 12: Conclusion

The preceding chapters identified the ways in which the Crown is a deficient State theory and proposed an alternative State theory that will remedy the deficiencies. This conclusion summarises the key findings.

12.1. Achieving definitional clarity

A major issue is understanding who or what the Crown is. Chapters 4, 5 and 6 examined the problems with defining the Crown.

Chapter 4 showed that the Crown does not adequately distinguish between the Sovereign and the government. This is the result of a 17th century conceptual error that resulted in the Crown becoming a synonym for the king as a corporation sole.¹ Attempts to reconceive the Crown as a modern corporation aggregate comprising the apparatus of government have not successfully displaced the corporation sole analogy.² The result is that the Crown continues to deny the government a legal personality that is distinct from the Sovereign.

The proposed State theory remedies this issue by recognising the State as a distinct legal entity from the Sovereign.³ The Sovereign will remain the Head of State but the State will be capable of acting in its own name. This will align the constitutional position with the political reality that the Sovereign has ascended politics and government is no longer simply a collection of ministers serving the Sovereign.

Chapters 5 and 6 analysed the confusions regarding the ambit of the Crown. Chapter 5 showed that it is uncertain whether the Crown embodies all three branches of government or only the executive branch. The common usage of the Crown to denote the executive gives rise to

¹ See Section 4.3.

² See Section 4.6.

³ See Section 11.3.

arguments that New Zealand law has no entity such as the “State” that embraces all three branches.⁴ This leads to the unsatisfactory suggestion that the Crown is only liable for the actions of the executive and that there is no remedy for legislative and judicial breaches of constitutional guarantees.⁵ The decision of the Supreme Court in *Attorney-General v Chapman* perpetuates this confusion.⁶ References to the “Crown” and Māori as partners under the Treaty of Waitangi typically construe the Crown as the executive branch only.⁷ This excludes Parliament and the judiciary from the definition of “Treaty partner” and belies the constitutional understanding that these institutions also have duties under the Treaty.

A further issue is that the Crown’s ambit does not correspond with any constitutional understanding of the executive branch or public sector. Chapter 6 showed that statutory definitions and common law tests delineate the Crown in inconsistent ways: the control test construes the Crown more narrowly than the executive branch;⁸ the prejudice test extends the ambit of the Crown to include private entities;⁹ the function test is archaic and presupposes that certain functions “properly belong within the province of government”.¹⁰ The chapter found that courts determine whether or not a public entity is the Crown on the basis of whether that entity should enjoy an immunity or special rule that attaches to the Crown, whether the Crown should be liable for that entity’s actions,¹¹ and whether land possessed by that entity can be the subject of a claim by Māori.¹² The Crown’s ambit is therefore more policy-driven than principled. The incoherence surrounding the Crown’s boundaries masks a deeper lack of understanding about the demarcation between the executive government and the wider public sector.¹³

⁴ *Attorney-General v Chapman* [2011] NZSC 110 at [14]; see Section 5.3.3.

⁵ *Chapman*, above n. 4, at [8], *per* Elias CJ; see also Philip Joseph “Constitutional law” [2012] NZLRev. 516.

⁶ *Ibid.*

⁷ See Section 5.4.

⁸ See Section 6.3.1.

⁹ See Section 6.3.2.

¹⁰ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 326 – 327.

¹¹ See Sections 6.4 – 6.5.

¹² *Accident Compensation Corporation v Stafford* [2018] NZHC 218 at [49] and [86].

¹³ See Sections 3.4. and 6.3.1.

The proposed State theory addresses the issues identified in Chapters 5 and 6 by defining the State consistently with s 3 of the New Zealand Bill of Rights Act:¹⁴ that is, the State will comprise “the legislative, executive or judicial branches of the Government of New Zealand”¹⁵ and “any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”¹⁶ This definition should banish the confusion left by the majority decision in *Chapman* and confirm that the State includes all three branches of government. The Crown’s obligations under the Treaty will vest in the State. The State will assume the Crown’s role as Treaty partner with Māori and this will reinforce the constitutional understanding that the executive, legislative and judicial branches each has duties under the Treaty. The concept of the State will further bring the entire public sphere under one umbrella and equate the ambit of the State with all entities that are subject to the Bill of Rights Act and Part 1A of the Human Rights Act 1993.¹⁷

The thesis also proposes a definition for the executive branch to clarify the demarcation between the executive and wider public sector.¹⁸ It suggests that the executive should comprise the Sovereign or her representative, the Governor-General, the Executive Council, the Cabinet, the Prime Minister, Ministers, the government departments and agencies that are currently part of the public service as defined in s 27 of the State Sector Act 1988. All other public entities should be part of the wider public sector. The proposed demarcation should clarify whether public entities such as the Police come under the scope of the Bill of Rights Act through s 3(a) or through s 3(b).¹⁹

¹⁴ See Section 11.4.

¹⁵ New Zealand Bill of Rights Act 1990, s 3(a).

¹⁶ New Zealand Bill of Rights Act 1990, s 3(b).

¹⁷ Human Rights Act 1993, s 20J.

¹⁸ See Section 11.4.3.

¹⁹ As to the confusion regarding whether an entity is subject to the New Zealand Bill of Rights Act 1990 through s 3(a) or s 3(b), see Andrew Butler “Is this a public law case” (2000) 31 VUWLR 747.

The definition of the State necessitates three further reforms. First, the State cannot be liable for all the entities that are part of the State without cutting across the principles of the Public Finance Act 1989.²⁰ Accordingly, the thesis recommends that Parliament should provide a list of entities for which the central government will be liable. Other entities will be liable in their own right.²¹ Secondly, existing statutory references to the Crown must be redrafted so that the different ambits of the Crown and the State do not result in unintended consequences. This is particularly so for immunities that attach to the Crown.²² Thirdly, whether land that is subject to a claim by Māori can be returned to Māori will depend on whether the land is subject to any private interest.²³ The focus on private interest would be consistent with s 6(4A) of the Treaty of Waitangi Act 1975, which bars the Waitangi Tribunal from recommending that the Crown acquire or return any privately-owned land to Māori.

These reforms distinguish the ambit of the State from the scope of State liability and the assessment of which entities are subject to immunities or distinct rules. This makes the ambit of the State principled as opposed to policy-driven, and consequently more coherent than the Crown.

12.2. A simpler and more coherent framework of liability

The current legal framework for Crown liability suffers from significant deficiencies. Chapters 7, 8 and 9 reviewed these issues.

Chapter 7 showed that s 6 of the Crown Proceedings Act 1950 largely limits the Crown's liability in tort to vicarious liability for the actions of its servants and agents. This impedes findings of systematic liability against the Crown²⁴ and further makes it difficult to hold the Crown vicariously

²⁰ Law Commission *Crown liability and judicial immunity: a response to Baigent's case and Harvey v Derrick* (NZLC R37, 1997) at [98].

²¹ See Section 11.4.4.

²² See Section 11.4.5.

²³ See Section 11.7.

²⁴ See Section 7.5.2.1.

liable where an officer enjoys a statutory immunity.²⁵ Nineteenth century New Zealand law did not experience these problems when it allowed direct Crown liability in tort.²⁶ The present issues are a result of the New Zealand Parliament having imported, almost verbatim, the provisions of the Crown Proceedings Act 1947 (UK). The English law on Crown liability had historically lagged behind New Zealand law because English courts continued to apply the maxim “the king can do no wrong” to the executive government throughout the 19th and early 20th centuries.²⁷ The 1947 statute retained vestiges of the maxim.²⁸

The thesis submits that the solution is to make the State directly liable in tort.²⁹ Direct State liability will treat the act or omission of any officer, whether or not lawful, as the act or omission of the State. This will make it easier to hold the State liable for systematic failings where there is no identifiable tort on the part of any individual officer. It will also enable findings of State liability where an officer enjoys a statutory immunity. The conceptual foundations for direct State liability already exist in contract³⁰ and public law damages.³¹ Extending the same principle to the State’s tortious liability will achieve a more consistent framework of liability.

Chapter 8 examined the Crown’s immunity from mandatory orders in judicial review and under s 17 of the Crown Proceedings Act. It found that there is neither historical nor modern justification for the immunity: it is simply a residue of the principle that the king’s courts cannot command the king.³² The chapter analysed the immense confusion that results from s 17(2) of the Crown Proceedings Act, which prevents courts from enjoining officers of the Crown if the

²⁵ See Section 7.5.2.2.

²⁶ *R v Williams* [1884] NZPC 1; 9 AC 418; *Dawson v R* (1884) 3 NZLR (CA) 1; see discussion of these cases in Section 7.4.2.

²⁷ See Sections 7.2 – 7.4.

²⁸ See Section 7.5.

²⁹ See Section 11.5.1.

³⁰ Janet McLean “The Crown in contract and administrative law” (2004) 24(1) OJLS 129 at 131 and 136.

³¹ *Maharaj v A-G for Trinidad and Tobago* [1978] 2 All ER 670 at 679, *per* Lord Diplock; *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667; 1 HRNZ 42 at 58, *per* Cooke P; 75, *per* Casey J; 80- 81, *per* Hardie Boys J; 104, *per* McKay J.

³² See Section 8.2.

effect would be to enjoin the Crown.³³ Courts occasionally hold that officers are acting as the Crown and are immune.³⁴ At other times, courts suggest that ministers can be enjoined in their personal capacity under s 21(2) or s 17(2).³⁵ Elsewhere, courts find that officers are acting as *persona designata* rather than the Crown and can therefore be enjoined in their official capacity.³⁶ There is little coherence or consistency between these findings.

The solution to these issues is simply to abolish the immunity from mandatory orders. The proposed State theory allows mandatory orders to lie against the State and against any officer or entity that is part of the State.³⁷ This will make it unnecessary for courts to distinguish ministerial acts from acts of the State when granting mandatory orders against the former. It will also bring greater consistency between the remedies available against the State than those available against private parties.

Chapter 9 studied the presumption that the Crown is exempt from statute unless the statute states otherwise either expressly or by necessary implication. The chapter found that the presumption originates from the literal approach to statutory interpretation and has no modern justification.³⁸ It is a deviation from the principle of equality before the law.³⁹ It creates considerable uncertainty in legal analysis because courts struggle to interpret whether a statute applies to the Crown by necessary implication and whether or not an entity that is claiming to be exempt is the Crown.⁴⁰ The only reason the presumption persists is because of a fear that

³³ See Section 8.3.

³⁴ *Harper v Secretary of State* [1955] 1 All ER 331; *Merricks v Heathcote-Amory* [1955] Ch. 567; *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85; *Aratiki Honey v Ministry of Agriculture* [1979] 2 NZLR 311; see Section 8.3.2.2.

³⁵ *Merricks*, above n. 34; *Bird v Auckland District Land Registrar* [1952] NZLR 563; *Fiordland Venison Ltd v MacIntyre* [1979] 2 NZLR 318; *M v Home Office* [1992] 1 QB 271 (CA); see discussion in Section 8.3.2.4.

³⁶ *Padfield v Minister of Agriculture Fisheries and Food* [1968] UKHL 1; *R v Home Secretary, ex parte Phansopkar* [1976] QB 606 (CA); *R v Secretary of State, ex parte Herbage* [1986] 3 All ER 210 (QBD); *M v Home Office* [1994] 1 AC 377 (HL); see discussion in Section 8.3.2.3.

³⁷ See Section 11.5.2.

³⁸ See Section 9.2.

³⁹ See Section 9.3.1.

⁴⁰ See Section 9.3.2.

reversing the presumption will have unintended consequences for statutes that do not expressly exempt the Crown.⁴¹

The proposed State theory reverses the presumption in two stages to safeguard against the risk of unintentional consequences for the executive.⁴² Statutes enacted after 2000 will be presumed to bind the executive with immediate effect because the prevalent drafting practice since 2000 has been for statutes to state expressly whether or not they bind the Crown.⁴³ Statutes enacted on or before 2000 will also become binding on the executive after a certain time-frame so as to give Parliament the opportunity to preserve any specific exemptions that are necessary and appropriate. A statute may exempt an entity that is part of the State by express words only. Necessary implication will not be sufficient to rebut the presumption. This will make the law more certain and make it unnecessary for litigants to dispute whether an entity is exempt from a statute by “necessary implication”. It will be more consistent with the rule of law because it would subject the State to the same set of obligations as private individuals.

Overall, the effect of these proposals is to remove the conceptual barriers to Crown liability that lack justification and create confusion and uncertainty. The resulting framework of State liability is simpler and more coherent.

12.3. A coherent basis for executive power

The executive obtains most of its authority from statute. It relies on the concept of the Crown for prerogative powers and residual freedom. Chapter 10 contended that the prerogative and residual freedom are unsatisfactory sources of executive authorisation. Prerogatives are remnants of the Sovereign’s historic powers.⁴⁴ The definition and scope of prerogatives are uncertain. The lack of parliamentary pre-approval for prerogatives challenges the constitutional

⁴¹ For example, see Law Commission *To bind their kings in chains* (NZLC SP6, 2000).

⁴² See Section 9.3.3.

⁴³ Ibid, see Law Commission, above n. 41, at [14].

⁴⁴ See Section 10.3.

ideal that executive power should be democratically legitimised. The Crown's residual freedom confers on the executive a freedom to act in the absence of positive legal authorisation that no other public entity enjoys.⁴⁵ Residual freedom can compromise individual liberties. There is also a risk that the executive can rely on residual freedom to supplement the scope of statutory power. There are powerful academic calls for both prerogative power and residual freedom to be replaced with positive statutory empowerment.⁴⁶

The proposed State theory reconceptualises all executive power as having a statutory source.⁴⁷ This requires Parliament to replace the remaining prerogatives with statutory authorisation and replace residual freedom with a provision that the executive can only act in ways that are "reasonably incidental" to and consequential upon the achievement of a statutory purpose.⁴⁸ A statutory basis to all sources of executive power is more consistent with the ideal of democratic legitimisation.⁴⁹ It dispenses with the archaism that the State derives its powers from the Sovereign. It also gives effect to the principle that the purpose and existence of a public body should be defined by its "public responsibility".⁵⁰ The reasonably incidental doctrine gives the executive the flexibility to carry out its day-to-day functions while circumscribing that flexibility with reference to statutory purposes.

12.4. Implementing the reforms

None of the proposed reforms are radical. The conceptual building blocks for the proposed State theory are readily available in New Zealand. An informal State tradition has existed in New Zealand since the 19th century.⁵¹ Section 3 of the New Zealand Bill of Rights Act and s 20J of the Human Rights Act 1993 implicitly recognise that the State comprises all three branches of

⁴⁵ See Section 10.4.

⁴⁶ B V Harris "Replacement of the royal prerogative in New Zealand" (2009) 23 NZULR 285; Philip Joseph *Constitutional and administrative law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 655-659.

⁴⁷ See Section 11.6.

⁴⁸ See Joseph, above n. 46, at 655.

⁴⁹ See Harris, above n. 46, at 287.

⁵⁰ *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (CA) at 523, *per* Laws LJ.

⁵¹ See Section 11.2.

government and the public sector. A comprehensive list of entities that comprise “New Zealand’s State sector” appears on the State Services Commission’s website.⁵² The concept of direct State liability has also existed in New Zealand at least since *Baigent’s Case*.⁵³ Many statutory bodies already have an inbuilt “reasonably incidental” condition on the scope of their statutory powers.⁵⁴

This thesis has shown how these concepts can be drawn together to form a coherent State theory if New Zealand were to discard the confusing overlay of the Crown. Chapter 11 found that neither republicanism, nor a written constitution, nor a referendum are necessary preconditions for the shift from the Crown to the proposed State theory. A coordinated programme of legislative reforms should be sufficient.⁵⁵ The onus for taking the next step is on the executive and Parliament.

⁵² State Services Commission “New Zealand’s State sector – the organisations” (1 February 2018) <<https://www.ssc.govt.nz>>.

⁵³ *Baigent’s case*, above n. 30, at 58, *per* Cooke P; 75, *per* Casey J; 80- 81, *per* Hardie Boys J; 104, *per* McKay J.

⁵⁴ Crown Entities Act 2004, ss 14, 17 and 18.

⁵⁵ See Section 11.8.

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